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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 606

STATE OF ILLINOIS,

Petitioner,

VS.

WILLIAM ALLEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Petition For Certiorari Filed September 17, 1969
Certiorari Granted December 8, 1969

APPENDIX

RELEVANT DOCKET ENTRIES

February 20, 1968—Petitioner's petition for writ of habeas corpus filed.

February 20, 1968—Leave granted to petitioner to file in forma pauperis.

May 24, 1968—Order granting leave to file in forma pauperis vacated; cause dismissed.

July 17, 1968—Leave to appeal in forma pauperis granted.

July 29, 1968—Notice of appeal filed.

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(September 18, 1957; Pre-Trial Proceedings before the Honorable Edward B. Casey; hearing on Respondent's motion for a change of venue.)

[59] The Court: Now, what's your next motion? You can make a motion for a change of venue from this judge, if you want to. If you don't want to, I'm very glad to try it.

Defendant Allen: No, you're not going to get a chance, because you're prejudiced and I'm getting out of this courtroom. I'm asking for that motion right now. Seeing as you overruled my motion, I'm overruling your motion to overrule my motion that you're not going to let me be tried in this here county.

The Court: Okay.

Defendant Allen: And I'm getting out of this courtroom now.

The Court: What I'll do is this: I'll appoint the Public Defender.

Defendant Allen: I'm not accepting him.

The Court: Somebody has to draft your petition.

Defendant Allen: No.

The Court: Are you going to draft your own petition?

Defendant Allen: I want a change of venue. I'm calling my sister this evening to have a lawyer to appear in court to defend me.

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(September 19, 1957; Pre-Trial Proceedings before the Honorable Grover C. Niemeyer.)

[71] Defendant Allen: I am asking for a lawyer this morning. I would like to ask you for a lawyer, is that all right with you? Uh-huh?

The Court: Why don't you want the Public Defender?

Defendant Allen: Because he is not good enough to protect me. He can't protect me from the State's Attorney, he is incompetent and he doesn't see eye to eye with me on the case. He has a different opinion.

I would like to ask for one of these lawyers from the Chicago Bar Association. William Scott Stewart, Floyd Thompson, Emmett Byrne, John S. Boyle, Adlai Stevenson, George Bieber, Mike Brodkin, John Gutknecht, Jerry Giesler, Everett Williams, Erle Stanley Gardner. Them are lawyers of my own choosing, any one of which you can give me.

What do you have to say about that?

The Court: I am not going to ask either of those gentlemen to serve. If you don't want the Public Defender the Bar Association has a committee on defense of criminals, if they want to send some one out to represent you, all well and good. Otherwise, you will have to get your own counsel.

[72] Defendant Costa: I would like to see if I can't get Raymond Marks to defend me.

The Court: That is all right.

Defendant Allen: They hit me over in the court room the other day. This other court, I don't know where it was.

I want to re-ask you, I want the court to order the State's Attorney to furnish me with a list of witnesses, the names and addresses and so forth; the names of the jurors, a copy of any written statement made by anyone with reference to my case.

You know I have got to have the names of the jurors. When you go before a court you are supposed to get a list, ain't that right? I want to order the State's Attorney to give me that because I have to have that. Everyone is supposed to be entitled to that before your arraignment. They told me they would give it to me.

The Court: If the Bar Association—

Defendant Allen: No, we already got that straight, we want to get this now. We want to get this list of jurors.

The Court: Just a moment, just a moment, young man.

Defendant Allen: Don't get mad at me, I'm only [73] asking.

The Court: I don't know how you can put in what you don't know about the handling of these matters. If the Bar Association will furnish one of their men on the committee to defend you it is perfectly agreeable with the court. That attorney will then make the necessary request and there is no need for you to do it.

Defendant Allen: Yes, I would like to—

The Court: I have a little over 50 years' experience as a lawyer and some of it in the State's Attorney's Office, 24 years—

Defendant Allen: Did you work for the State's Attorney?

The Court: What?

Defendant Allen: Were you a prosecutor?

The Court: Oh, yes.

Defendant Allen: Yes? That's what I figured.

The Court: Way back in 1917 to 1920.

Mr. Branion (Asst. Public Defender): A very good one, too.

The Court: And I was First Assistant.

Defendant Allen: Getting back to this thing, I would like to order them to give me that because I am entitled to it. You ain't going to order it? You deny it?

[74] The Court: No, I am not making any orders whatever.

Defendant Allen: You are denying me them?

The Court: No.

Defendant Allen: You are accepting me then?

The Court: Now just be quiet. I'll tell you what will be done here. I will have—will you communicate with the Bar Association?

Mr. Branion: Yes, Judge.

The Court: And have them appoint someone and they will see you. That lawyer then will represent you in court. I will entertain what motions he makes.

Defendant Allen: You mean he will represent me if I accept him, isn't that what you mean?

The Court: Yes, I'll do the best I can. If he will not represent you, why if you won't take him, then it is up to you to get a lawyer or attempt to defend yourself.

Defendant Allen: No, no, no, I am incompetent, I can't defend myself.

The Court: I was going to say that men who defend themselves generally go to the penitentiary.

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(October 14, 1957; Pre-Trial Proceedings before the Honorable Grover C. Niemeyer).

[86] Mr. Kallick (Asst. State's Attorney): How much time would counsel need to prepare on the 1956 indictments?

Mr. Kelly (Defense Counsel): Frankly, I haven't even seen—but just casually I would think—

The Defendant: Wait a minute. Wait a minute right here. We are going to handle them with another, we are going to have another lawyer on these charges. This man has too much work to do. They have six or seven indictments against me. This man can't do this by himself. This man only had fifteen minutes conversation with me. You are going to give him a continuance. Let him have a recess and let him get himself together, because he can't handle six cases at once. You are going to give him some more lawyers or let, or let this man have a continuance on the 1957 charge.

The Court: The Court has practised law more than fifty years.

The Defendant: I know, and I have been listening to it a while.

The Court: Since 1904, and I think I am more competent than the defendant to determine whether he needs more than one lawyer. We are only going to proceed on one case at one time. You can rest assured counsel [87] will be given ample time to prepare for the case upon which the State proceeds, and the State will advise him in advance as to what date he expects to proceed.

The Defendant: I am beginning to think you might need a little sanity test yourself.

The Court: Well, that may be true.

The Defendant: I know it might be.

Mr. Kallick: If the Court please, the State will be ready at any date the Court may see fit, to proceed on 56-1628 for trial.

Mr. Kelly: Do you have the copy?

The Defendant: No, I don't.

Mr. Kelly: The State advises me in this particular indictment there is an habitual count in it.

Mr. Kallick: That is correct.

Mr. Kelly: In view of that, if your Honor please, I would think that I would need at least two weeks.

The Defendant: He is not going to defend me in the trials in th 1956 cases. I am going to be my own lawyer.

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(December 11, 1957; Proceedings before the Honorable Grover C. Niemeyer; Commencement of trial.)

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[96] The Defendant: I want another lawyer. I don't want him as my lawyer.

Mr. Kallick (Asst. States Attorney): The State's ready, your Honor.

The Defendant: I want to be my own lawyer. I don't want him no more.

The Court: Well, now, you've had several lawyers.

The Defendant: But I never had myself for a lawyer.

The Court: Now, wait a minute. I'm not going to permit lawyers, properly chosen, to be thrown out and rejected unless there is some valid reason. Now, you told me some time ago, when I asked you, that you had no ex-

[97] perience and you did not feel qualified to act as your own lawyer. Now we have got these cases reduced to

the 1956 cases, in effect, through the activities of your present counsel, wiping out your 1957 cases, because of the presumption pending or existing prior to your restoration in October.

Now, of course, a defendant is permitted to represent himself. But, as I've told you before, it's generally fatal. I would suggest to you that you proceed to trial with Mr. Kelly.

The Defendant: No.

The Court: You'll get better results.

The Defendant: No, I won't. I want to be my own lawyer. I've got a whole bunch of law books they sent me from a law school and I'm taking a course in it, and I've got them in my cell now.

The Court: Well, that still doesn't make you a lawyer.

The Defendant: I know how to do it. I can be my own lawyer. That's my right. I read it in a book. I've got the right to be my own lawyer.

The Court: Well, as I've frequently said, the law [98] gives a man the right to be his own lawyer, but it cannot give him the ability and the talent and the experience to successfully be his own lawyer.

The Defendant: I believe I'll be a success. Anyway, the only time I've ever seen this lawyer was just now for about two minutes back in the bullpen. I've never seen him before that. I've never seen him before, since you told me last time I was in court to see him and talk to the lawyer, and you told me to talk to him now. This is the first time I've ever seen him and for only two minutes.

The Court: I'm satisfied, from what I've been advised, that he has been making a diligent search, in an effort to prepare and represent you to the fullest extent.

The Defendant: I want to be my own lawyer.

The Court: I'll let you be your own lawyer, but I'll ask that Mr. Kelly sit in and protect the record for you, insofar as possible.

The Defendant: I don't want nobody advising me and I don't need no help from anybody. I want him com-
[99] pletely sitting aside from my case.

The Court: The court has some responsibility and some authority and, for your own protection, that is the way we will conduct the trial.

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(Voire Dire Examination of a prospective juror by the Respondent.)

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[114] GEORGE ALEXA, a prospective juror, having been first duly sworn, to answer questions, was examined as follows:

Examination by the Defendant:

Q. What's your name?

A. George Alexa.

Q. Where do you live?

A. Berwyn.

[115] What's your address?

A. 1413 South Ridgeland.

Q. How long have you lived there?

A. Approximately nine years.

Q. Have you got any children?

A. Three children.

Q. How old are they?

A. Two, twenty year old girls and one boy 7.

Q. Are they married?

A. Yes, sir.

Q. Does your wife work?

A. No, sir.

Q. Do you work?

A. Yes, sir.

Q. Where do you work?

A. At the present time at Lawless Press.

Q. What's your occupation?

A. Traffic manager.

Q. How much do you get paid a week?

A. It all depends, if I work Saturday, I get paid additional, otherwise I get paid $135.00.

Q. How long have you been working there?

A. Six months.

Q. Were you ever in the army?

[116] A. No, sir.

Q. What schools do your children go to?

A. One girl is married, one is a beautician at the present time and I have a little boy going to a parochial school.

Q. Were you born in this country?

A. Yes, sir. Cicero.

Q. Have you lived there all your life?

A. Cicero and Berwyn.

Q. Have you ever served on a jury before?

A. No, sir.

Q. Has your wife ever served on a jury before?

A. Not to my knowledge. I'd say no. I'd have to, because I would know.

Q. Have you ever been arrested before?

A. What are you referring to "arrested"?

Q. Anything.

A. Parking tickets, yes.

Q. Did you ever serve in jail for it?

A. No, sir.

Q. Did you ever hear of me before?

A. Absolutely not.

Q. Did the State's Attorney try to bribe you, or anything?

[117] A. Absolutely not.

Q. The same as they'd like to have you find me guilty.

A. No, sir.

Q. When you were called in this case, if you found out that I served 7 years in the penitentiary, that wouldn't make you prejudiced, would it?

A. Absolutely not.

Q. If you find out that I served four years in Sing Sing, that wouldn't make you prejudiced would it?

A. No, sir.

Q. Have you ever been in jail?

A. No, sir.

Q. Have you ever spoke to a psychiatrist?

A. Absolutely not.

Q. Do you know any of these people in the Criminal Court here?

A. Absolutely not.

Q. Do you know the State's Attorney?

A. Absolutely not.

Q. Do you know anybody working in this whole building?

A. Not to my knowledge.

[118] Q. Not to your knowledge?

A. No.

Q. When you go back in the room there— You kind of hesitated when he asked you about your bringing a verdict back.

A. I misunderstood him, just like I told him.

Q. Do you misunderstand me?

A. No, I don't.

Q. You know what I'm saying to you?

A. That's right, I do.

Q. What's your nationality?

A. I'm Bohemian.

Q. All Bohemian?

A. Yes, sir.

Q. Were you born in this country?

A. My mother and father were, yes; not the grandfather.

Q. Do you have anything against any other nationality?

A. Absolutely not.

Q. Negroes?

A. Absolutely not.

Q. Irish?

A. Absolutely not. I've got friends in every na-
[119] tionality.

Q. Do you use narcotics?

A. Absolutely not.

Q. Do you drink?

A. I do, yes.

Q. How much do you drink?

A. Just enough to take care of me. A couple of drinks, that's all.

Q. To take care of you. When you drink, do you usually get real drunk?

A. No, sir.

Q. Are you drunk now?

A. No, siree. I'll tell you, I haven't had a drink for sometime.

Q. Especially since Christmas is here.

A. No, sir. I just don't like it.

Q. Has any of your family been in an insane asylum?

A. No, sir.

Q. Have they ever been in prison?

A. No, sir.

Q. How old are you?

A. 42. I'll be 42 December 29th.

Q. Why didn't they take you in the army?

[120] A. Because I was rejected. Ruptured.

Q. Very seriously?

A. Yes, sir. And after I was taken care of, I was given a deferment. By that time I was on government work.

Q. Have you ever been stuck up?

A. No, sir.

Q. Did you ever know anybody that was stuck up?

A. I never heard of anybody. They might have been but they never told me.

Q. You say you're living in Chicago all your life?

A. No, sir. I lived in Cicero and Berwyn. I was born in Chicago.

Q. You never served any time in jail before?

A. Absolutely not.

Q. What grade in school did you go to?

A. 7th Grade.

Q. The 7th Grade in school?

A. That's right.

Q. In other words, you haven't gotten much of an education?

A. Yes, I have.

Q. You have an education?

A. Yes, sir.

[121] Q. You mean, just by seeing people and talking to them, you've learned a lot from them?

A. Yes, I have.

Q. That's a pretty good education. What school did you go to?

A. I was in an orphanage.

Q. When you were a little boy?

A. That's right. I got out when I was fifteen.

Q. Do you know which orphanage you were in?

A. Yes, sir.

Q. Which one?

A. St. Joseph's Bohemian Orphanage in Lisle.

Q. And it was because of the fact that you'd been in there that you were more or less incarcerated. You were just a child and you were just incarcerated because you couldn't go out in the world for yourself. That's the reason?

A. That's the reason. My mother died and my father couldn't take care of me.

Q. What religion are you?

A. I'm a Catholic, a Roman Catholic.

Q. And you don't have nothing against no other religion, do you?

A. No, I don't. Everybody should be something.

[122] Q. If these people should come to find out I don't believe in God, that wouldn't make any difference?

A. That doesn't mean anything to me.

Q. Do you know these people are trying to send me to the penitentiary?

A. I don't.

Q. Well, I'm going to tell it to you. You know, these people are trying to make a mockery over here.

A. No, I don't. No.

Q. How long have you worked at this place?

A. Which place? Which one?

Q. Where you work now.

A. Six months.

Q. Where did you work before that?

A. At Wallace Press, 22 years.

Q. 22 years?

A. That's right.

Q. In one place?

A. That's right.

Q. How come you quit?

A. I resigned to take a salesmanship job.

Q. Do you know any policemen on the police force?

[123] Do I know any policemen?

Q. Yes.

A. I know them casually. I say hello and good-bye.

Q. Do you know them by name?

A. No.

Q. Do you have a garden in your yard, around your house?

A. Well, if we do, it's nothing, just grass. What are you referring to, "a garden"? You mean vegetables?

Q. Just grass?

A. Yes.

Q. You take very good care of it, don't you?

A. My wife does, I don't.

Q. You like to see it taken care of?

A. That's right.

Q. If you see something growing long, you wouldn't like that, would you?

A. I have a 7 year old boy, and if he wants to play on the grass, let him do it. If he's got any of his friends, let him do it, let him play. We don't have many playgrounds.

[124] Q. If someone was tramping over your grass and bothering you, you wouldn't like that, would you, a stranger?

A. No, I don't think so.

Q. You wouldn't like him kicking through your yard, would you?

A. I can't answer yes or no. Nobody has done it.

Q. You say you have a boy seven years old?

A. That's right.

Q. Does he go to school?

A. Yes, sir. He's in 2nd grade.

Q. What school is that?

A. St. Mary's LaSalle Parochial School.

Q. Where's that?

A. In Berwyn.

Q. Do you own an automobile?

A. Yes, I do.

Q. What kind do you own?

A. A 1955 Buick.

Q. Is it paid for?

A. Yes.

Q. You paid for it?

A. Yes, sir.

Q. Did you just come into the criminal court building today?

[125] A. No, sir. This will be—Last week Monday will be the second.

Q. In other words, you've been going through this kind of stuff for a long time?

A. No, sir.

Q. Is this the first time you ever sat in a jury chair?

A. Yes, sir.

Q. In this court building?

A. We did have something at Judge Casey's, that's right.

Q. Something?

A. It was just a short case.

Q. What was it about?

A. A sanity plea.

Q. A sanity plea?

A. That's right.

Q. To determine whether a person is sane?

A. That's right. On one witness, the doctor. We didn't hear the case.

Q. You didn't hear the case.

A. No, sir.

Q. In other words, you just find out—

[126] A. Just the doctor came in and gave his verdict, what he thought the individual was, sane or insane.

Q. What did you say?

A. We said he was sane.

Q. And do you know what he was charged with?

A. No, we didn't. We didn't hear the case.

Q. Do you know anything about insanity?

A. No, I don't.

Q. These people got me here, the Judge and the State's Attorney,— they've got me in here,— and my lawyer, he's turned against me— and everytime I come in the courtroom there is some mention of it. But the man,—here's my lawyer right over here (indicating)—he's been my lawyer for approximately three months and he's up here

defending me, supposed to defend me. They were going to take me to trial this morning out here before you people. And do you know how long he spoke to me, before they brang me in here? He spoke to me six minutes. He spoke to me two minutes back there (indicating)—

Mr. Kallick: I'm going to object to this.

The Court: Now, Mr. Allen, I've been exceedingly [127] patient. You've asked a lot of irrelevant and immaterial questions. You've had a number of attorneys. Mr. Kelly has been acting for you for over a month now, and you insisted this morning upon the right to try the case yourself, as attorney, but you've got to keep within the regular bounds. You've asked a lot of immaterial questions, which were personal, which I don't think the juror should be called upon to answer, and you will confine yourself solely to questions relating to their qualifications as jurors and I want no statement from you as to any matters of fact.

The Defendant: Are you finished?

The Court: Proceed.

The Defendant: Are you finished?

The Court: Proceed.

The Defendant: As I was telling you, I had this lawyer and he had spoken to me for six minutes.

The Court: No.

The Defendant: In other words, you don't want the jury to know what you're doing up here, but I'm going to tell them what you're doing. There's going to be no lawyer that's going to speak to me for six minutes, when my life is at stake here, and push me into trial. That man [128] don't even know my name.

The Court: Just a minute. I told the jury that I'm permitting you, at your request, to represent yourself.

The Defendant: That's right.

The Court: But I'm not going to permit you to make a lot of statements of fact, which may or may not be true, and I'm not going to attempt to determine their truth. You are now examining a jury, and it's immaterial as to any difficulties, real or fancied, which you might have had with your attorney or with the court. You'll limit yourself to proper questions. I want no further statements.

The Defendant: Are you finished?

The Court: Proceed.

The Defendant: I'm telling you this lawyer has been my lawyer for six minutes, a six minute lawyer in my life.

The Court: All right. Now, just a minute. If you persist in that, I'll insist—

The Defendant: What?

The Court: (Continuing)—that you take your seat.

[129] The Defendant: And then what?

The Court: And I'll ask the lawyer to proceed with the examination of the jurors.

The Defendant: You might do that but you just told me I could be my own lawyer, and I asked you for a continuance ten minutes ago.

The Court: You may be your own lawyer,—

The Defendant: That's right. I'm going to be.

The Court: (Continuing)—if you keep within bounds, but only under those circumstances.

The Defendant: You don't want me to tell the jury about he's only been my lawyer for six minutes, huh?

The Court: I don't want you to tell the jury anything at this time.

The Defendant: In other words, you just want me to stare at them, is that it?

The Court: You may ask proper questions, as I've told you, relating to their qualifications but nothing beyond that.

The Defendant: I think that's a real proper question to ask the man. I believe that's a real sensible thing to ask him.

The Court: The only question you've got before [130] you is competency and qualification of the juror.

The Defendant: That's right.

The Court: And limit your questions to that.

The Defendant: Seeing that it's going to be brang out during the trial that my lawyer is incompetent and that you people are forcing me up here to be my own lawyer, on my own will, but you're forcing him on me, I have no alternative but to become my own lawyer, when a man gets back there and talks to a person charged with a criminal thing for six minutes, there is no trial.

The Court: Just a moment. You have had several attorneys appointed.

The Defendant: That's right.

The Court: Being unable to get any for yourself,—

The Defendant: That's right.

The Court: (Continuing)— I've appointed Mr. Kelly here, who has been admitted to the Bar for a number of years.

The Defendant: I think that was very nice.

The Court: He served three years as a prominent trial attorney in the United States District Attorney's office here in Chicago.

[131] The Defendant: I'm aware of all that.

The Court: And he's been a fine lawyer in civil matters since then. He has a background of experience and of competency.

The Defendant: There is no doubt about that. Everything you said is true and you have given me these lawyers.

The Court: It has been reported to me that you made the statement back in the room there that you were going to take two weeks to get this jury—

The Defendant: I want you to prove that. Can you prove it?

The Court: Now, don't interrogate the court.

The Defendant: You're just prejudicing the jury against my making a remark like that. It's true, I'm going to have the jurors locked up. They're going to be locked up and stay locked up so these guys can't get to them. I'm going to keep them locked up in the jury quarters.

The Court: We'll determine that when the time arrives.

The Defendant: You ain't supposed to sit up there [132] and tell people about what you heard, what you can't prove it.

The Court: Well, I've only been on the bench 24 years and I've only practiced law over 50, and I think I will determine how the court is to be run.

The Defendant: Niemeyer, I know you are a good judge and I know you've been here for 24 years. Whether it's been 34 or 44, it don't make no difference to me. I believe you're a fair judge and that's why I'm here— because I believe you're one of the most competent judges in the building, you and Judge Dieringer, because I read the

statement you made against the State's Attorney and I figure you had a lot of nerve to make that statement. What I'm trying to explain to the jury is that I'm on trial for my life.

The Court: No, you're not. You're on trial for your liberty.

The Defendant: No. I'm on trial for my life.

The Court: You're on trial for your liberty. The crime against you is subject to punishment by one year to life in the penitentiary.

[133] The Defendant: No. You're wrong, your Honor, it's natural life.

The Court: Now you will proceed as I direct or you'll sit down and I will have counsel proceed with the selection of the jury.

The Defendant: Well, you start directing, then. I asked you to—

The Court: Proceed.

The Defendant: Can I address the court first? Seeing that you have the conversation swinging back and forth between me and you, I'd like to say something. I've asked the State's Attorney to supply me, as an order from Judge O'Connell's court, Judge Casey's—

The Court: No. We don't want to hear about that.

The Defendant: You're going to hear about it.

The Court: The court has passed upon it. Be seated.

The Defendant: There's no trial. If you try to make me sit down, there is going to be ranting in the courtroom and you'll have to carry me out, and I want to be present here at my trial all through the trial. I'm going to talk.

The Court: You will be permitted to be present
[134] at this trial—

The Defendant: That's right.

The Court: (Continuing)— so long as you conduct yourself in accordance with the law and with the dignity and propriety of the court and no longer.

The Defendant: Do you call that dignity, when the jurors are laughing and the State's Attorney is sitting up there smiling?

The Court: You'll be seated.

The Defendant: This is no joke. There will be no laughing in the courtroom.

The Court: Mr. Bailiff, seat the defendant.

The Defendant: But I'm not going to keep quiet. I'm just going to sit here and talk.

The Court: We'll see.

The Defendant: You'll see.

The Court: Mr. Kelly, you will proceed with the examination of this juror.

The Defendant: Kelly is not going to be my lawyer.

The Court: Proceed.

The Defendant: He's not going to be my lawyer and there's not going to be no mockery here, when he's
[135] bothering me. When I go out for lunchtime, you're going to be a corpse here.

The Court: Just a moment. Let the record show that the defendant tore the file, which his attorney had, and threw the papers on the floor.

One more outbreak of that sort and I'll remove you from the courtroom.

Proceed, Mr. Kelly.

The Defendant: And I have the right to be in the courtroom.

The Court: Proceed, Mr. Kelly.

The Defendant: You have the right to restrain me, but you haven't got the right to remove me and you're not going to remove me.

The Court: I'll determine that.

The Defendant: No, you're not. There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.

The Court: Proceed, Mr. Kelly.

Mr. Kelly: Q. Mr. Alexa, —

The Defendant: Kelly, I don't want you to handle [136] my trial. Now, get out of here.

The Court: Now, just a minute.

The Defendant: You were supposed to come and visit me in the County Jail, —

The Court: Just a moment.

The Defendant: (Continuing)— and the record shows that you did not visit me in the County Jail.

The Court: Mr. Bailiff, you will remove the defendant.

The Defendant: I want to be present in the courtroom when my trial is going on.

The Court: You may be present—

The Defendant: I'm going to be present.

The Court: (Continuing)— if you conduct yourself properly.

We will proceed, in the absence of the defendant, who, by reason of his conduct is interfering with the proper trial of the case, wilfully and deliberately.

(Thereupon, the defendant was taken out of the courtroom.)

Mr. Kelly: In order that the jurors, the prospective jurors, get a proper perspective, Judge Niemeyer appointed me as the attorney for Mr. Allen. Contrary to what [137] he said to you people, I visited him—

The Court: You needn't go into that, you needn't go into that. Just limit yourself to the proper examination of the jurors.

Mr. Kelly: I just want to apprise you people, you people who have been questioned, Mr. Alexa, Mr. Young, Mr. Drees and Mrs. Dahl, that it is the duty of you jurors, if you are selected, to try the issues here, to take the evidence as it comes off the witness stand.

What you have seen here before should not in any wise color your opinion. It's what comes off that witness stand that is important. And, in a criminal trial, you all are well familiar with the fact that the State must prove its case beyond a reasonable doubt. Allen, the defendant, has the assumption of innocence carried with him all the way up to the time you gather in the jury box and in your jury room for deliberation, at the conclusion of this case, after hearing both sides.

Now, I'll ask you, Mr. Alexa, if what you've seen [138] in any wise puts you in a frame of mind that you couldn't give Allen a fair trial.

Juror Alexa: No, sir.

Mr. Kelly: How about you, Mr. Young?

Juror Young: No, sir.

Mr. Kelly: Mr. Drees?

Juror Drees: (Nodding.)

The Court: Gentlemen, you'll have to speak up.

Juror Drees: No.

Mr. Kelly: Mr. Dahl?

Juror Dahl: I believe I can be impartial.

Mr. Kelly: You have no quarrel with the fact that, in a criminal case, the State must prove its case beyond a reasonable doubt?

Juror Dahl: No.

Mr. Kelly: Mr. Young, would your answers be the same?

Juror Young: Yes, sir.

Mr. Kelly: What you have seen transpire here—

Juror Young. Wouldn't affect me at all.

Mr. Kelly: And you can give Mr. Allen a fair and impartial trial?

Juror Young: Yes, I will.

Mr. Kelly: As you will the State.

[139] Juror Young: Both sides.

Mr. Kelly: Both sides?

Juror Young: Yes, sir.

Mr. Kelly: I will accept the panel.

The Court: Swear in the panel.

Mr. Kelly: Excuse me, they tendered four and I was going to accept the four.

The Court: Yes, the four. Swear the panel.

(Thereupon, the panel of four jurors was sworn to try the issues.)

• • • • •

[176] (Thereupon the following proceedings were had out of the presence and hearing of the jury:)

The Court: Will counsel step up? We'll recess until two o'clock.

Mr. Reddy (Asst. States Attorney): Judge, I just had a report that one of the officers in this case and, apparently, Allen—

Mr. Kelly: Had what?

The Court: I know all about it. He took off his shoes and broke a window and attempted to cut himself with it and he's been treated by the doctor.

Mr. Reddy: Officer Janousek. We're trying to get one of the witnesses, an F.B.I. agent, in. He said he didn't get the okay from Washington to appear in court and he asked if tomorrow morning is all right.

The Court: We'll have to see where we're going. But what I have in mind is that the jurors will go to lunch with the Bailiffs. He made a statement in regard that he wanted the jury locked up.

Mr. Kelly: Yes.

The Court: We better consider that before we adjourn this afternoon.

[177] And I wish you'd also advise him, at two o'clock, when the matter is resumed, that he may return to the courtroom, if he will agree to remain silent and obey the order of the court and respect the decorum of the court.

Mr. Kelly: I don't know if you want this on the record or not, but possibly if I could remove myself from the bench and stay over there (indicating), my presence wouldn't bother him.

The Court: I don't think it has anything to do with this.

Mr. Kelly: What I wanted to say is that in the matter of any objections, as to what I thought would be incompetent evidence, I could still make the objections for the record.

The Court: I haven't any objection to your sitting there, but unless he changes his mind radically, from the statements that he has made on previous hearings, it's his intention to obstruct the trial and to render it as ridiculous and impossible as possible. I just wanted you to be informed about that and to have those two questions in mind.

Mr. Kelly: Yes, your Honor.

* * * * *

2:00 O'Clock P.M.

Court convened pursuant to recess.

* * * * *

[179] The Clerk: William Allen.

(Thereupon, the following proceedings were had out of the presence and hearing of the jury):

The Court: Bring out the defendant William Allen.

(Thereupon, the defendant was brought into the courtroom.)

The Court: Mr. Allen, you were removed from the court this morning, as you know, because you refused
[180] to permit the orderly procedure of the trial. The jury has been chosen and selected. We are now ready to proceed with the introduction of evidence, after the statements, if any, by counsel. You will be permitted to remain in the courtroom, if you will agree to conduct your-

self according to the decorum of the courtroom, in order that we may have an orderly trial and, namely, not interrupt the proceedings, as you were doing this morning, by your constant talking.

The Defendant: You ain't scaring me, Judge. I'm standing in this here courtroom, and I'm going to get a fair trial, and I'm not receiving a fair trial under these conditions. My lawyer does not know nothing about me. He only talked to me for six minutes and that's not good enough. I don't know what he's going to do.

The Court: All right, you refuse, then, to tell the court that you will behave yourself and not interfere with the introduction of the case?

The Defendant: I want to be in the courtroom at all times. Anytime anything is said about me in the courtroom, I want to be here, and I've got the right to be [181] in the courtroom, and I'm going to be here.

The Court: You have the right to be in the courtroom, if you behave yourself properly.

The Defendant: I'm calling that properly. That's what I call properly.

The Court: But you have no right to conduct yourself as you conducted yourself this morning.

The Defendant: I have the right to conduct myself anyway I see fit, when I'm getting an unfair trial—and this is an unfair trial. And the lawyer does not know nothing about me; and my sister and 20 other people have come over there and told me they want to be subpoenaed into court to try and help me. And where are they at? where are the subpoenas at? Where are my friends at? My sister don't even know I'm on trial today.

The Court: That's your fault, isn't it?

The Defendant: That's right. It is his fault, my lawyer's fault.

The Court: Very well, you may sit at the Bar.

The Defendant: I'm going to talk at the Bar, too. I'm going to sit there and I'm going to talk and I'm go-
[182] ing to keep talking until someone hears me and does something about it.

The Court: You're going to keep on talking as you talked this morning?

The Defendant: I'm going to speak every time I have reason to speak, that's right.

The Court: Well, the court will be obliged to determine that. I'll give you another opportunity but that is all.

Let him be seated at the Bar, at the table, and we will proceed with the trial of the case.

Bring in the jury.

At the first interruption,—

(Thereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Proceed.

Mr. Kelly: May it please the court, I would like to make a motion, on behalf of the defendant, to exclude the witnesses.

The Court: All witnesses will be excluded. One police officer may remain with the State's Attorney.

[183] (Witnesses excluded.)

The Court: Have you got all your witnesses out?

Mr. Kallick: Yes, your Honor.

The Defendant: Where are my witnesses at?

The Court: Proceed.

The Defendant: No. There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.

The Court: Remove the defendant,—

The Defendant: I want to be in court.

The Court: (Continuing)— and we will proceed through the trial without his presence.

The Defendant: No, you're not going to proceed through the trial without my presence.

(Thereupon, the defendant was taken from the courtroom.)

The Court: Proceed.

[184] Opening Statement By Mr. Reddy:

May it please the court, counsel, ladies and gentlemen: At this time I would like to make an Opening Statement only for the purpose of giving you ladies and gentlemen an opportunity to follow the evidence. This is what we call a bird's eyeview of what the State intends to prove in this case.

We intend to prove, from that witness stand (indicating), from the testimony of people who were there, that, on the night or in the early morning at 3:00 A.M., in the City of Chicago, at approximately 825 West 69th Street, the defendant, armed with a weapon, walked in and said, "This is a stickup." And we intend to prove that beyond a reasonable doubt.

And that will be, particularly, the State's case. There won't be a great deal of witnesses. But what we feel here, we feel and we intend to prove beyond a reasonable doubt,

that the defendant in this cause is guilty of the charge in the indictment.

[185] If the court please, I'd like to call, as the first witness,—

The Court: Just a moment. The defense has not made an Opening Statement.

Mr. Reddy: If he wishes. I beg your pardon.

The Court: Proceed.

Opening Statement By Mr. Kelly:

May it please the court, ladies and gentlemen of the jury, since you have been sworn to try the issues in this cause, I again have the privilege of asking you to keep an open mind until you've heard all of the evidence that comes off that witness stand. In answer to your questions on the voir dire, you promised to give both sides a fair and impartial trial and I know you will do it. Please wait until all the evidence is in. Thank you very much.

The Court: Proceed.

Mr. Reddy: Will you call Mr. John Collins, Mr. Sheriff?

(Whereupon, the People of the State of Illinois, to maintain the issues on their part, offered and introduced [186] the following evidence, to-wit:)

JOHN COLLINS, a witness called on behalf of the People of the State of Illinois, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Reddy:

Q. Will you state your name, please, and keep your voice up so all these people can hear you?

A. John Collins.

Q. Where do you live, Mr. Collins?

A. I live at 8750 Throop Street.

Q. And that's in the City of Chicago, is it?

A. Right.

Q. Were you ever employed at the Club Maxine located at 825 West 69th Street in Chicago?

A. Yes, I was.

Q. How long were you so employed there?

A. I believe it was over a year.

Q. And, were you employed there at approximately 3:00 A.M., on August 12th, 1956?

A. Yes, I was.

[187] Q. What, if anything, unusual took place at that time, if you recall?

A. Well, at that time, almost about 3:00 o'clock in the morning, just before closing time, I had some customers at the bar and this man walked in.

Q. How many customers, if you remember?

A. About 15, I'd say.

Q. Yes? And then what happened?

A. This man walked in the front door and walked all the way to the other end and asked for a drink. And, when I served him, he got a pistol on me and told me to give him the money that was in the register, which I did.

Q. Now, how much money did you give him from the register?

A. Oh, approximately $200.00 or more.

Q. Did you take anything else?

A. Nothing else.

Q. How long was he in the room or in the bar or at the bar?

A. About five minutes.

Q. Was it lighted up?

A. Yes, it was.

[188] Q. Was he wearing a hat at that time?

A. No.

Q. Could you see him very well?

A. Yes.

Q. When was the next time you saw the defndant in this cause?

A. On the next afternoon.

Q. At what time?

A. About 5:00 o'clock in the afternoon.

Q. And where did you see him at?

A. 11th and State.

The Court: Q. That's the police station?

A. The police station, yes, sir.

Mr. Reddy: Q. Did you see him in a showup at that time?

A. Yes, I did.

Q. How many men were in that showup, if you recall?

A. I believe five.

Q. Did you have a conversation with the defendant in this cause at that time?

A. No.

Q. Did he say anything to you at all?

A. He pointed me out as the fellow who he had stuck up the night before.

[189] Q. He said to you that he stuck you up?

A. Yes.

Q. Was there anybody else with you at that time?

A. Yes. The boss of the place where I worked.

Q. What's his name?

A. Pat McDonald.

Q. Was he present at that time?

A. Yes.

Q. And did you identify him in the showup?

A. Yes, I did.

Q. And everything you have testified to happened in the City of Chicago and the County of Cook and the State of Illinois?

A. Yes, sir.

Mr. Reddy: That's all. Cross.

The Court: Just a moment.

Bring in the defendant.

Mr. Reddy: We haven't been able to identify him.

(Thereupon, the defendant was brought into the courtroom.)

The Court: Stand right there.

The Defendant: Right here on the spot?

The Court: Turn around, please?

[190] Go ahead.

Mr. Reddy: Q. Now, Mr. Collins, I'm going to ask you, in front of this jury, is this the man that you saw at the showup, William Allen, the defendant in this cause?

A. This man here.

Q. Is this the man that identified you as having stuck you up?

A. Yes.

Q. You heard him say that and you identified him in the presence of Mr. McDonald, is that correct?

A. That's right.

Mr. Reddy: That's all.

The Court: All right, take him back.

The Defendant: I want to stay in the courtroom.

The Court: You may stay whenever you promise me to conduct yourself properly.

The Defendant: I'll promise you shit.

(Thereupon, the defendant was taken out of the courtroom.)

* * * * *

(Direct examination of Patrick J. McDonald, a witness called on behalf of the People.)

* * * * *

[204] When was the next time, if any, that you saw the man that put the gun to John Collins?

A. The same day, 5:00 o'clock that afternoon, at the Detective Bureau, at 11th and State Street.

Q. Was there any conversation, in the presence of this man that put the gun to John Collins, and yourself and any police officer?

A. There was. The fact that he identified us as the people that he had robbed.

Q. Well, can you remember, to the best of your recollection, what words he used?

A. They asked him if he had ever seen John Collins before, and he said that he had, that he had held him up the night before.

Q. Did you identify him as the man that had stuck
[205] up John Collins at that time?

A. No. He identifed me as the man.

Q. He identified you?

A. They asked him if he recognized me, and he says, "He seems familiar. I must have stuck him up at some time or other."

Mr. Reddy: Judge, would you bring out the defendant?

The Court: All right, bring out the defendant.

(Thereupon, the defendant was brought into the courtroom.)

Mr. Reddy: Q. Now, Mr. McDonald, for the purpose of the record in this cause, do you see anyone in the courtroom that you saw on August the 12th, 1956, at approximately 3:00 A.M.?

A. Yes, sir.

Q. Will you point him out, please?

A. (Indicating.)

Mr. Reddy: Indicating, for the record, the defendant William Allen.

The Witness: William Allen.

Mr. Reddy: Q. And, for the record, also, sir, is this the same man that you identified in the afternoon of
[206] August the 12th, 1956, at a showup?

A. He is.

Q. And is this the same man that identified Mr. Collins, as having stuck him up, in your presence?

A. That's right.

Q. And everything you testified to happened in the County of Cook?

A. Yes, sir.

Mr. Reddy: Cross examine.

(Thereupon, the defendant was taken out of the courtroom.)

* * * * *

(Direct examination of Harold Sell, a witness called on behalf of the People.)

* * * * *

[228] The Court: Just a moment. Do you want to identify the defendant?

Mr. Kallick (Asst. States Attorney): Yes.

The Court: Bring back Mr. Sell.

Bring in the defendant.

Will you take the witness chair, please?

(Thereupon, the defendant was brought into the courtroom.)

HAROLD SELL, resumed the stand and testified further as follows:

Further Direct Examination by Mr. Kallick:

Q. Mr. Sell, the defendant in this case, William Allen, now before the Bar,—is that the same William Allen whom you arrested on the date specified, August 12th?

A. Yes, it is.

Mr. Kallick: That's all.

(Thereupon, the defendant was taken out of the courtroom.)

* * * * *

(Direct examination of Vernon Dolan, a witness called on behalf of the People.)

* * * * *

[244] (Thereupon, the defendant was brought into the courtroom.)

Further Direct Examination by Mr. Kallick:

Q. Mr. Dolan, I'm asking you to observe the defendant in this case, William Allen, who has been brought into court. Is this the same William Allen whom you spoke to on August 12th and about whom you testified?

A. He is.

Mr. Kallick: Thank you, that's all.

May he remain for one more question?

The age of the defendant? Can we have the age of the defendant?

Mr. Kelly: Ask him.

The Court: How old are you?

Mr. Kallick: Will you stipulate as to the age of the defendant? May we stipulate to the defendant's age?

[245] Mr. Kelly: I cannot stipulate.

The Court: Very well. Step aside.

(Thereupon, the defendant was taken out of the courtroom.)

* * * * *

[252] THE PEOPLE OF THE STATE OF ILLINOIS

vs.

WILLIAM ALLEN

Indictment No. 56-1629.

Before Judge GROVER C. NIEMEYER and a Jury.

Thursday, December 12th, 1957,

10:00 o'clock A.M.

Court convened pursuant to adjournment.

PRESENT:

Hon. Benjamin S. Adamowski, State's Attorney of Cook County, by Mr. Sidney Kallick and Mr. William Reddy, Assistant State's Attorneys, appeared for the People; Mr. John J. Kelly, Jr., appeared for the defendant, and William Allen, the defendant, appeared pro se.

The Clerk: William T. Allen.

The Court: Bring in the defendant.

(Thereupon, the following proceedings were had out of the presence and hearing of the jury:)

A Deputy Sheriff: Mr. Kelly wants a few more minutes with him.

The Court: All right.

(A recess was taken, after which the following pro-
[253] ceedings were had:)

The Court: Are you ready?

Mr. Kelly: Yes, your Honor.

The Court: All right, bring in the defendant. (Thereupon, the defendant was brought into the courtroom.)

The Defendant: I told you to be here yesterday.

Good morning.

The Court: We're ready to proceed with the defendants in this case. If you will assure the court that you will behave yourself, conducting yourself in a manner consistent with the decorum of the court, which is necessary for a fair and effective trial, you may remain in the courtroom.

The Defendant: Well, I'd like to say something about yesterday. I might have got a little carried away. But you see this here handcuff on me (indicating)—

The Court: Yes.

The Defendant: (Continuing)— and these police escort next to me. Yesterday I was handcuffed to the Warden of the Cook County Jail and the Chief Bailiff, Mr. McGuffage, and I've got this uniform stamped all over [254] it, in ten different places, "Maximum security," and that is not exactly what a person looking at me would call an innocent person.

You don't want to listen to me?

The Court: I want to know whether or not—

The Defendant: I'm getting around to whether or not I'm going to cooperate—

The Court: All right. Then go ahead.

The Defendant: (Continuing)—and behave myself.

But when I'm walking around here and sitting before the jury and I don't know what to say, and I'm afraid, anyway, because my lawyer don't know me, he don't know nothing about me, and the man has never spoken to me only for about two mintues, I don't know, I just don't know. And yesterday it proved that he was unprepared to defend me, because my sister and my brother and all my friends weren't in court to try and help me. And, under this heavy police escort, all these people and cops standing around here, I mean, I'm nervous and I don't like them

standing around me. I know you're a good judge, Nie-
[255] meyer, because I read about you in the paper and you and Dieringer are all right with me, but all I want is a fair trial.

The Court: I want to give you a fair trial but I must insist on proper conduct and decorum in the courtroom. I gave you an opportunity yesterday and you didn't take advantage of it. You went far beyond bounds. We have now reached the point where we're putting in the defense. And if you will promise the court to behave yourself, conduct yourself properly, I'll permit you to remain, otherwise—

The Defendant: If you would let me ask my sister what to do. I don't know what to do. My sister is sitting behind me, on my left hand side, with my brother back there.

The Court: If you want to talk to your sister for a few minutes in the jury box, I'll let you talk to her.

The Defendant: I don't know what to do. Put her there and release me from these shackles.

The Court: What's her name?

[256] The Defendant: My sister Louise.

Mr. Kelly: Mrs. Robertson.

The Court: Mrs. Robertson.

The Defendant: I don't see why she has to be made a spectacle in the jury box. Why don't they send a couple of cops back in the judge's chambers?

The Court: Please let us follow our usual practice.

The Defendant: Release me from these shackles. I mean, I'm standing.

The Court: No.

The Defendant: I'm standing right here. There are enough police and guns in the courtroom. I know I'm dangerous but I'm not that dangerous, if I gave my word that I'll be cooperative for these few minutes here with my sister, if he releases me.

My word's good, ain't it?

The Court: I am not going to permit you to have a talk here with your sister—

The defendant: You just said it then.

The Court: (Continuing)— out of the presence of the Sheriff.

The Defendant: In other words, you want me to [257] stand here and tell my sister—

The Court: No. You may sit there in the jury box and talk to her.

The Defendant: In a private conversation?

The Court: You may talk to her. The other people in the courtroom are not going to hear, but I'm not going to ask the Sheriff to release you from the handcuffs.

The Defendant: This handcuff actually isn't doing nothing. If I wanted to get loose from it, it's simple.

The Court: All right. Then it's interfering with nothing. You may go over there and talk with her.

The Defendant: He said let go.

Did you tell him to let go?

The Court: No.

The Defendant: Then, no, I'm not going to have no police escort making a fool out of me and my family.

The Court: I'm not going to let them make a fool out of you or your family.

The Defendant: Let him send them back to the bullpen. I want to talk to my sister.

[258] The Court: I offer you an opportunity to talk to your sister.

The Defendant: She ain't going to throw me no gun. Judge, with these two people, just for the record, anything they hear can't be used against me?

The Court: It will not be permitted.

The Defendant: This is Sgt. Seminara (indicating) from the Cook County Jail and this is Mr. McGuffage (indicating) one of the Chief Bailiffs.

The Court: I told you it will not be permitted to be used.

Mr. Kelly: The lady has been subpoenaed as a witness. Can she go back in the witness room, in view of the order excluding witnesses?

The Court: When we get ready to proceed, yes.

The Defendant: Subpoena my brother, while he's here, if you want.

Mr. Kelly: At this time, your Honor, I want to make a motion—

The Court: Now, just a moment. I've got a matter pending here as to whether or not you will assure [259] the court—

The Defendant: I'm telling the court this: I want another lawyer. My sister just told me that Kelly did not say none of them statements to her. She told me that Kelly was not a good lawyer, and she advised me not to cooperate with him because he's trying to get me in trouble, he's trying to get me sent to the penitentiary or an insane

asylum, or something of that sort, and I shouldn't cooperate with him. However, I want to stay in the courtroom and explain to the people what happened.

The Court: You will not be permitted to make any statements in court, except as you may be examined as a witness, if you are called; and that, of course, is a matter entirely within your judgment.

The Defendant: Well, I don't think that it would be very wise for me to make a statement or another outburst in court like I did last night. I don't think that would be very wise, because if I do—

The Court: All right. If you will assure me that [260] you will not disturb the proceedings, I'll permit you to remain.

The Defendant: I'm going to tell you this: I'm not going to disturb the proceedings of the court, because I was told if I did, when I get back over here in the bullpen, they're going to hit me in my head. That's why I'm not going to disturb, because I'm afraid. I'm going to sit down and I'll be quiet, so you won't hit me in the head. Because I know, when I got back in the bullpen, they've got the bullpen on me and they told me what will happen. I'll sit down and be quiet, and I'm not going to say nothing, because I know what will happen to me, if I do.

The Court: Very well, be seated at counsel table and we'll proceed with the trial.

* * * * *

[287] (A recess was taken, after which the following proceedings were had:)

The Court: Bring in the defendant and then bring in the jury.

(Thereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Call the next.

Mr. Kelly: Mr. Allen to the stand.

The Defendant: Take the handcuffs off.

The Court: Remove the handcuffs.

The Defendant: I'm not supposed to have handcuffs on in court, anyway. That's what they tell me, anyway. And it hurts my arm, anyway, unless I would smack one of you in the mouth and then you could put them on.

The Court: All right. Just confine yourself to answering the questions put to you.

* * * * *

(December 13, 1957; further proceedings of the trial.)

* * * * *

[413] (Thereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Did you arrive at a verdict?

The Foreman: Yes, your Honor.

The Court: Deliver it to the Bailiff.

Read the verdict.

The Clerk: "We, the jury, find the defendant, WIL-

LIAM ALLEN, guilty in manner and form as charged in the indictment. And we further find from the evidence that the said defendant, WILLIAM ALLEN, is now about the age of 25 years."

It's signed by George Alexa, foreman of the jury and the eleven other jurors.

The Court: It will be received and entered.

The jury may retire.

* * * * *

[420] The Court: He will be sentenced to the penitentiary for a minimum term of ten years and a maximum thirty.

OPINION OF THE SUPREME COURT OF ILLINOIS

Docket Nos. 38195, 39047 cons.—Agenda 3—January, 1967.

The People of the State of Illinois, Appellee, v. William Allen, Appellant.

PER CURIAM: Athough this cause is a consolidation of defendant William Allen's writ of error from a jury conviction for robbery, and his appeal from the dismissal of his post-conviction petition in regard thereto, he argues solely the appeal from the judgment of conviction. Since both are founded upon substantially the same claims of error and contentions, we believe justice will be served by considering the matter as argued.

It is uncontroverted that on August 12, 1956, at about 3:00 A.M., defendant entered a tavern and after ordering a drink took $200 from the bartender at the point of a pistol. Later that day he was arrested and identified by the bartender and, conversely he identified the bartender as the man he had robbed.

In a 1956 pretrial sanity hearing, defendant was found incompetent to stand trial. Approximately a year later, on October 19, 1957, in a second competency hearing, the defendant, represented by the public defender, was declared sane and competent to stand trial. Thereafter, defendant expressed dissatisfaction with the public defender and informed the court he had an attorney of his own choice. However, when no attorney appeared in his behalf and upon his statement to the court that he did not wish to represent himself, he was offered the choice of the public defender or an attorney from the bar association defense

committee. He refused both and requested one from a list of attorneys he presented. The court refused this request and indicated it would appoint a lawyer from the bar association, whereupon defendant requested that he be allowed to represent himself. The court granted this request and in addition thereto appointed the bar association attorney to assist and advise in order "to protect the record."

In his attempted *voir dire* examination of the jurors, defendant indicated a lack of knowledge of the law and procedure involved and by his improper and inadequate conduct it became apparent that the judicial process was deteriorating. Upon the court's suggestion that counsel take over the examination, defendant became boisterous, unruly and persisted in proceeding personally, refusing to remain quiet. At one point he tore up the attorney's file and threw the papers to the floor. When the court failed in its efforts to have the trial proceed with dignity and decorum, it ordered defendant removed from the courtroom and directed the attorney to proceed in defendant's behalf. After the jury was selected, defendant was allowed to return and participate in his trial but before the examination of State's witnesses he resumed his unruly and derogatory conduct, refusing to abide by the court's directions. He was again excluded and not allowed in the courtroom during the presentation of the State's case except when brought in, under guard, to be viewed by the State's witnesses.

Defendant was permitted in the courtroom, shackled, during the presentation of his defense but was not allowed to conduct his own defense. The record before us indicates that the trial court made every effort to control him, and that the shackling appeared to be a necessary measure to accomplish this end.

The only evidence in defense consisted of the testimony of defendant's sister and brother and of the defendant himself reciting his specific acts of misconduct and unusual past behavior, and further testimony that he was confined to a mental institution in 1953.

On rebuttal, Dr. William Haines, Director of the Criminal Court Behavior Clinic, testified that he had examined Allen on several occasions from September 11, 1956, to September 7, 1957, and that in his opinion defendant was legally sane on each occasion.

The jury was instructed on the question of guilt, nonguilt and insanity and was given three forms of verdicts: guilty, not guilty, and insane at the time of the commission of the crime. The jury returned a verdict finding Allen guilty of the crime as charged.

On appeal, defendant claims "he was deprived of his right to be present at his own trial, denied the right to confront the witnesses against him, and deprived of his liberty without due process of law." Additionally, he contends that "he was insane at the time of the commission of the robbery and/or at the time of the trial. If he was sane at the time of his trial he had the right to conduct his own defense, which right was denied."

The law is clear that an accused has the right to appear and defend in person as well as by counsel; that he has a right to confront the witnesses against him, and that he is entitled to be present and to participate at every stage of the trial. Where the accused is not present in person, the error is not cured by the presence of counsel, as his attorney has no power to waive his right to be present. (*People* v. *Smith*, 6 Ill. 2d 414, 416.) It is also well established that these constitutional privileges were conferred for the benefit and protection of the accused but, like

many other rights, they may be waived by him. In *People* v. *DeSimone,* 9 Ill. 2d 522, 533, we held that the court did not exceed its legitimate powers when it proceeded while the accused voluntarily absented himself from the trial and that "The same result must follow under the circumstances attending this defendant's involuntary absence. It is obvious from the record that defendant's removal was necessary to prevent such misconduct as would obstruct the work of the court; such misconduct was, in turn, effective as a waiver of the defendant's right to be present. The right to appear and defend is not given to a defendant to prevent his trial either by voluntary absence, or by wrongfully obstructing its progress."

We have said on occasion that the reasonable limits to which a judicial opinion must be confined may not permit a complete or detailed analysis of each and every act of the defendant which may have resulted in the trial court's action. This applies in the instant case. The record is replete with rude, boisterous and disrespectful conduct of the defendant toward the court and its orders. The trial judge was both patient and tolerant, and his exclusion of the defendant was justified. It was only when he became unruly that the court instructed the lawyer to conduct the defendant's *voir dire* examination. It is sufficient to say that the record reflects defendant's awareness of his right to conduct his own defense and his deliberate attempt to use this right to obstruct the trial. By such conduct, he waived any constitutional rights to be present, confront the witnesses against him and conduct his own case at the times he was excluded from the courtroom. Therefore, we find that the court did not err in excluding the defendant and delegating the attorney to represent his interest in his absence.

We further find that the court's designation of an attorney to assist and advise defendant at all stages of the trial was within its discretion and did not infringe upon his right to defend himself. For, as held in *People* v. *Burson*, 11 Ill. 2d 360, 373, the defendant's right to defend himself is subject to the constant duty of the court to protect the judicial process from deterioration occasioned by improper and inadequate conduct of the defense. In such situation the court possesses broad discretion in relation to the appointment of counsel for advisory or other limited purposes or to supersede the defendant in the conduct of the defense. Continuous supervision of the trial is required in order to maintain proper judicial decorum to the end that defendant may receive a fair trial.

We turn now to a consideration of defendant's contention that "he was insane at the time of the commission of the robbery and/or at the time of trial."

There is no basis in the record to support defendant's contention with respect to his sanity at the time of trial. Defendant was given a proper pretrial sanity hearing and the jury found him competent. Defendant did not at that time question the jury's finding and he does not now advance any reasons why that finding should be overturned.

With respect to the question of defendant's sanity at the time of the commission of the offense, the record discloses that the witnesses for the defense gave no opinion as to his sanity at any time but merely testified to his specific acts of misconduct and unusual past behavior. Although the further fact was established that defendant was confined to a mental institution in 1953, no reason for such confinement was given. The only expert witness to testify, Dr. Haines, who examined the defendant shortly after the commission of the crime and on other subsequent oc-

casions, stated that, in his opinion, the defendant was legally sane at the time of each examination.

The question of the defendant's sanity at the time of the commission of the offense was a matter for the jury. (*People* v. *Le May,* 35 Ill. 208.) We find that the jury was properly instructed on this question; therefore, its verdict of guilty was a determination that defendant was sane at the time of the commission of the offense.

Finding no error was committed in the trial of this cause, the judgments of the circuit court of Cook County are hereby affirmed.

Judgments affirmed.

Mr. JUSTICE WARD took no part in the consideration or decision of this case.

OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel* WILLIAM ALLEN, vs. STATE OF ILLINOIS	No. 68 C 316

MEMORANDUM OPINION AND ORDER

William Allen, relator in this cause, was granted leave to file his petition for a writ of habeas corpus in forma pauperis. Mr. H. Reed Harris, who represented relator before the Illinois Supreme Court, was appointed as counsel for him.

Relator presently is serving a sentence of ten to thirty years for armed robbery imposed by the Criminal Court of Cook County on December 13, 1957, after a jury trial. The judgment of conviction was affirmed by the Illinois Supreme Court on March 29, 1967, in 37 Ill. 2d 167, 226 N.E. 2d 1 (1967); certiorari was denied, No. 426 Misc., Oct. Term, 1967.

The sole contention before this Court is whether Allen's right to be present during his criminal trial was denied. The issue of insanity is not raised in the petition. The petition does not dispute the recitation of facts contained in the opinion of the Illinois Supreme Court, and, there-

fore, those facts are adopted herein. It will not be necessary to reiterate those facts, since they are clearly set out in *People* v. *Allen,* 37 Ill. 2d 168-173.

The law of the State of Illinois on the issue of defendant's right to be present at his criminal trial coincides with the Federal laws as established in *United States ex rel Shapiro* v. *Jackson,* 263 F. 2d 282 (2d Cir. 1959), *U.S.* v. *Switzer,* 252 F. 2d 139 (2d Cir. 1958), *Parker* v. *United States,* 184 F. 2d 488 (4th Cir. 1950). Even in the Federal Courts, limited exceptions to an accused's absolute right to be present throughout his trial are permitted.

The relator's conduct during the trial of his case in the Circuit Court of Cook County was rude, boisterous, and disrespectful toward the court and its orders, according to the opinion of the Supreme Court at 37 Ill. 2d 169-171. Such conduct certainly justified the trial judge's removal of relator during the *voir dire* examination, and at other times, and it also constituted a waiver of relator's right to be present. Allen's court-appointed attorney conducted the defense of the case both during his absence and while he was present.

The Court finds it unnecessary to direct the respondent to reply to the petition. A review by this Court, on its own motion, reveals that the petition, on its face, read in the light of the references therein, fully discloses the petition itself to be patently frivolous. Leave to proceed in forma pauperis should not have been granted. The order granting the same is hereby vacated and the cause is dismissed. (28 U.S.C. § 1915)

ENTER:

James B. Parsons (signed)

United States District Judge

Date: May 24, 1968.

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel* WILLIAM ALLEN, *Plaintiff,* vs. STATE OF ILLINOIS, *Defendant.*	No. 68 C 316

NOTICE OF APPEAL

To: John J. Stamos, State's Attorney, Chicago Civic Center, Chicago, Illinois; William G. Clark, Attorney General, 160 North LaSalle Street, Chicago, Illinois.

Notice is hereby given that WILLIAM ALLEN, plaintiff in the above captioned matter, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on May 24, 1968, and requests the Clerk to certify the complete record to the United States Court of Appeals Seventh Circuit.

DATED: July 25, 1968.

H. REED HARRIS,
Attorney for William Allen,
39 South LaSalle Street,
Chicago, Illinois 60603
Telephone: 346-4530

OPINION OF THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 17166

UNITED STATES OF AMERICA *ex rel.*, WILLIAM ALLEN,
Petitioner-Appellant,
v.
STATE OF ILLINOIS,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 7, 1969

Before HASTINGS, *Senior Circuit Judge.* KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is an appeal from the district court's dismissal of a habeas corpus petition filed by William Allen who is presently serving a ten to thirty year sentence in the Illinois State Penitentiary. The sentence was imposed by the Criminal Court of Cook County following the petitioner's conviction for armed robbery.

The question presented is whether the petitioner was denied his constitutional rights under the sixth amendment by reason of his forceable exclusion from the courtroom during part of his trial.

After his indictment and during the pretrial stage, the petitioner refused court-appointed counsel and indicated to the trial court on several occasions that he wished to conduct his own defense. After considerable argument by the petitioner, the trial judge told him, "I'll let you be your own lawyer, but I'll ask Mr. Kelly [court-appointed counsel] [to] sit in and protect the record for you, insofar as possible."

The trial began on September 9, 1956. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying, "When I go out for lunchtime, you're [the judge] going to be a corpse here." At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, "One more outbreak of that sort and I'll remove you from the courtroom." This warning had no effect on the petitioner. He continued to talk back to the judge, saying, "There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial." After more abusive remarks by the petition-

er, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued and the jury was selected in the absence of the petitioner.

After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he "behaved [himself] and [did] not interfere with the introduction of the case." The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The defendant protested this effort on the part of his attorney, saying: "There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me." The trial judge thereupon ordered the petitioner removed from the courtroom. The petitioner was again taken out of the courtroom and the trial proceeded. He was kept from the courtroom throughout the presentation of the prosecution's case except to be brought into the courtroom on four separate occasions in order to be identified by different witnesses. On each occasion he was immediately removed after the identification.

The petitioner was permitted in the courtroom during the presentation of his defense which was conducted by the appointed counsel.

In a consolidated appeal from the petitioner's conviction and a dismissal of his post-conviction petition in regard thereto, the Illinois Supreme Court affirmed. *People*

v. *Allen*, 37 Ill. 2d 167, 226 N.E. 2d 7 (1967). Certiorari was denied by the Supreme Court. *Allen* v. *Illinois*, 389 U.S. 907 (1967).

A defendant in a criminal proceeding has the unqualified right to be personally present at all stages of his trial. *Hopt* v. *Utah*, 110 U.S. 574 (1884); *Shields* v. *United States*, 273 U.S. 583 (1927). Although the Supreme Court has indicated that this right cannot be waived either by a defendant or his counsel, *Lewis* v. *United States*, 146 U.S. 370 (1892), there may be instances when a defendant who voluntarily absents himself from a trial effects a waiver of this right. For example, in *Parker* v. *United States*, 184 F. 2d 488 (4th Cir. 1950), the defendant was injured in an automobile accident during his trial. Neither the court nor counsel knew of the accident and assumed that the defendant had misunderstood the hour when court convened or had been temporarily delayed. The defendant's counsel suggested that the trial proceed and five witnesses were examined before it was learned that the defendant's absence had been caused by his injuries. The Fourth Circuit held that since the defendant had immediately been furnished a transcript of the five witnesses' testimony and did not object to their testimony or request that they be examined further, he voluntarily waived his right to be present during their examination. Certainly, if a defendant in a criminal case absconds during his entire trial or voluntarily and without excuse absents himself from the courtroom, he may waive his right to be present. But that is not this case. Here the defendant repeatedly demanded that he remain in the courtroom and on both occasions objected to his exclusion.

The Supreme Court of Illinois viewed the offensive conduct of the defendant as constituting a waiver of "any [of

his] constitutional rights to be present, [and] confront the witnesses against him. . . ." We respectfully disagree. A waiver, whether express or implied, denotes a voluntary, intentional relinquishment of a known right. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). It is essentially unilateral in character. A relinquishment of rights by waiver that is compelled by an election of choices is involuntary and not a waiver at all. The choice given the petitioner in the instant case by the trial judge, either to behave or be expelled from the courtroom, compelled the petitioner to involuntarily "waive" a constitutional right. No conditions may be imposed on the absolute right of a criminal defendant to be present at all stages of the proceeding. The insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver. Such conditions, if insisted upon, should and must be dealt with in a manner that does not compel the relinquishment of his right.

In light of the decisions in *Hopt* v. *Utah,* 110 U.S. 574 (1884) and *Shields* v. *United States,* 273 U.S. 583 (1927), as well as the constitutional mandate of the sixth amendment, we are of the view that the defendant should not have been excluded from the courtroom during his trial despite his disruptive and disrespectful conduct. The proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged. *United States* v. *Bentvena,* 319 F. 2d 916 (2d Cir.), *cert. denied,* 375 U.S. 940 (1963); *People* v. *Loomis,* 27 Cal. App. 2d 236, 80 P. 2d 1012 (1938).[1]

---

[1]An additional technique available to the trial judge for controlling the defendant's behavior was his contempt power.

Although we sympathize with the plight of the judge in the instant case and think he showed commendable patience under severe provocation, we nonetheless are of the opinion that he interfered with the defendant's constitutional rights. For that reason, we are compelled to hold that the petitioner's conviction is invalid.

The Court expresses its appreciation to H. Reed Harris, a member of the Illinois bar, for his excellent services as court-appointed counsel for the appellant.

The dismissal order of the district court is reversed.

HASTINGS, *Senior Circuit Judge* dissenting.

With deference to the distinguished majority, I feel compelled to dissent from its holding in this case. The majority opinion correctly recites the factual situation concerning petitioner Allen's gross misconduct during his trial in the Criminal Court of Cook County, Illinois. I read the constitutional mandates applicable thereto in a light different from my brethren.

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." Defendant was given that right in this case, but made his own free choice to voluntarily reject his enjoyment of it.

The majority mildly characterizes the trial judge's admonition to the defendant as "either to behave or be expelled from the courtroom." Later it recognizes the extremes to which the judge went to preserve some semblance of order in the court. My reading of the undisputed facts indicates to me that defendant was brazenly determined to make a shambles of the criminal judicial

process, unless he was permitted to dictate the rules of the game. Witness his threat, after much preliminary blatant misconduct, including a warning to the trial judge that at lunchtime the judge was "going to be a corpse here," when he said:

> "There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial."

Later, at his request, defendant was permitted to be present in court again, and made a similar threat to the judge that he would prevent the trial from proceeding.

The majority states that a "defendant in a criminal proceeding has the unqualified right to be personally present at all stages of the trial," and concludes as a matter of law that "No conditions may be imposed on the unqualified right of a criminal defendant to be present at all stages of the proceedings." I cannot accept the thesis that such an unconditional unqualified right in all criminal cases flows from the constitutional mandate of the Sixth Amendment.

The majority then proposes this unusual remedy for such an intolerable situation, —"The proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included "his being shackled and gagged." We all recognize that shackling and gagging a defendant has been judicially approved in certain circumstances. However, I respectfully suggest that such an after the fact holding on appeal is a far cry from the holding here that the failure of the trial judge to take such steps constituted such an inter-

ference with the defendant's constitutional rights as to invalidate his conviction.

I further suggest that if the majority holding becomes a prevailing constitutional precedent, then imagine the result that may occur in a criminal trial of multiple defendants who determined "to raise hell" and disrupt the trial to the point of no return. Shackles, chains, gags and a courtroom full of deputy marshals engaged in trying to keep the defendants off the floor may prove to be the climax in following "the proper course." I cannot believe the Federal Constitution requires that any such farce take place.

Neither can I believe that the Sixth Amendment's grant to an accused that he "shall enjoy the right" carries with it an unqualified right to have it on his own terms and that no conditions may be imposed thereon. Thus, the majority in effect says that a defendant has a right to be present at his trial and at the same time rules that the bedevilled trial judge must enforce this right upon the defendant by violent physical means, if necessary.

The majority puts forward a footnote alternative that an additional technique available to the trial judge for controlling the defendant's behavior is the use of the court's contempt power. I fail to see how the threat of punishment for contempt would restrain those determined to destroy the trial proceeding in progress. Defendant and his kind could care less.

The majority opinion properly recognizes those cases holding that a defendant who voluntarily absents himself from a trial effects a waiver of his right to be present. I find myself in agreement with the Supreme Court of Illinois, in upholding defendant's conviction, when it

equates a voluntary absence from the trial with circumstances leading to this defendant's involuntary absence. *People* v. *Allen*, 37 Ill. 2d 167 (1968). In either situation, a defendant by his own action brings about his absence from the trial.

Under the facts of this case, I would hold that the state trial judge did not err in his conduct of defendant's trial and that the district court properly dismissed defendant's petition for a writ of habeas corpus. I would affirm.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

ORDER OF REVERSAL

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Monday, July 7, 1969

Before

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

No. 17166
UNITED STATES OF AMERICA
ex rel. WILLIAM ALLEN,
Petitioner-Appellant,
vs.
STATE OF ILLINOIS,
Respondent-Appellee.

Appeal from the the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the dismissal order of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this day.

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
Tuesday, August 12, 1969
Before

Hon. LATHAM CASTLE, *Chief Judge*
Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*

No. 17166
UNITED STATES OF AMERICA
ex rel. WILLIAM ALLEN,
Petitioner-Appellant,
vs.
STATE OF ILLINOIS,
Respondent-Appellee.

Appeal from the the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition of petitioner-appellant for a rehearing *en banc* of the above-entitled cause be, and the same is hereby DENIED.

(Circuit Judges Fairchild and Cummings voted to grant the petition for rehearing *en banc.*)

Supreme Court of the United States

No. 606 ----- , *October Term, 19* 69

Illinois,

Petitioner,

v.

William Allen

ORDER ALLOWING CERTIORARI. Filed December 8 ---------- , 19 69

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

ONSE NOT PRINTED

OCTOBER TERM, 1969

NO. 606

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

UNITED STATES OF AMERICA, ex rel.
WILLIAM ALLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

JOEL M. FLAUM,
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Attorneys for Petitioner.

THOMAS J. IMMEL,
Assistant Attorney General;
Of Counsel.

Printed by Authority of the State of Illinois

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AUTHORITIES CITED:

IN TH

Supreme Court of t e United States

OCTOBER TER , 1969

NO. -

THE PEOPLE OF THE STAT OF ILLINOIS,

Petitioner,

vs.

UNITED STATES OF AMERI A, ex rel.
WILLIAM ALLEN,

Respondent.

PETITION FOR WRIT OF ERTIORARI TO THE UNITED STATES COURT O APPEALS FOR THE SEVENTH C RCUIT

Petitioner, The People of the State of Illinois, respondent-Appellee in the Court below prays that a writ of *certiorari* issue to review the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The majority and dissenting opinions of the United States Court of Appeals, Seventh Circuit, are reported at 5 Cr. L. 2321, —— F. 2d ——, (No. 17166, 7/7/69) and are attached hereto as Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals, Seventh Circuit, were entered on July 7, 1969, with one judge dissenting. The People's petition for rehearing by the Court *en banc* was denied on August 12, 1969, with two judges voting to grant the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether a criminal defendant is denied his constitutional rights under the Sixth Amendment when, because of his outrageous and disruptive conduct, the trial court orders his temporary removal from the courtroom during part of the trial?

CONSTITUTIONAL PROVISIONS INVOLVED
UNITED STATES CONSTITUTION
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wit-

nesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

The facts in the instant case, as developed in the opinions of the Illinois Supreme Court (*People* v. *Allen*, 37 Ill. 2d 167, 226 N.E. 2d 1) and the Court of Appeals below, are not in dispute. They are, in sum: On August 12, 1956, William Allen, Respondent herein, entered a tavern and after ordering a drink took $200.00 from the bartender at gunpoint. Later that day he was arrested and identified by the bartender. Respondent, in turn, identified the bartender as his victim.

Respondent was subsequently indicted and convicted of armed robbery. He was sentenced to serve ten to thirty years in the Illinois State Penitentiary.

Prior to trial, respondent indicated that he wished to conduct his own defense*. The trial judge was unable to convince respondent to avail himself of the services of counsel, but he did appoint counsel to stand by and assist should respondent so request.

> "The trial began on September 9, 1956. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the

*The defense was insanity.

judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying, 'When I go out for lunchtime, you're [the judge] going to be a corpse here.' At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. He continued to talk back to the judge, saying, 'There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.' After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued and the jury was selected in the absence of the petitioner.

"After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved [himself] and [did] not interfere with the introduction of the case.' The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The defendant protested this effort on the part of his attorney, saying: 'There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.' The trial judge thereupon ordered the petitioner removed from the courtroom." ——F. 2d at —— (No. 17166, 7/7/69).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION RENDERED IS INCONSISTENT WITH ILLINOIS SUPREME COURT DECISIONS DEALING WITH THE SAME ISSUE.

In 1957, the Illinois Supreme Court held in *People* v. *DeSimone*, 9 Ill. 2d 522, 138 N.E. 2d 556, that where a defendant's removal from the courtroom was necessary to prevent such misconduct as would obstruct the work of the Court, such misconduct was effective as a waiver of the defendant's right to be present.

> "The right to appear and defend is not given to a defendant to prevent his trial either by voluntary absence, or by wrongfully obstructing its progress." 138 N.E. 2d at 562.

The Court followed its *DeSimone* ruling in affirming respondent's conviction. *People* v. *Allen*, 37 Ill. 2d 167, 226 N.E. 2d 1 (1968).

There now exists a clear conflict between the decision of the Court of Appeals and what has been the law in Illinois for many years. This Court has frequently granted certiorari to resolve conflicts between State and Federal Courts. See *Forsyth* v. *Hammond*, 166 U.S. 506 (1897); *State of California* v. *Taylor*, 353 U.S. 553 (1957); *Marine Engineers Beneficial Assoc.* v. *Interstate S.S. Co.*, 370 U.S. 173 (1962). A similar grant is required here to resolve the conflict now existing.

II.

THE RENDERED DECISION RAISES A QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

Whether the accused has an absolute right to be present at all stages of the proceedings against him regardless of his outrageous and obstructive conduct is a question never decided by this Court. Because the rendered decision invalidates respondent's conviction—his guilt having never been in question—a pressing need exists for the Court to rule on this case of first impression. Cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), where certiorari was granted to review a question of first impression arising under the Fair Labor Standards Act of 1938.

III.

THE ORDERLY AND EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE REQUIRES THIS COURT'S DECISION ON THE QUESTION PRESENTED IN THIS CASE.

In affirming respondent's conviction, the Illinois Supreme Court held that his repeated outbursts and insults to the trial judge obstructed the work of the Court to such an extent that his removal became necessary, deeming his continued misconduct after he was warned to desist or be removed as a waiver of his right to be present.

The Court of Appeals disagreed with this common-sense rationale: "The proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged." 5 Cr. L. at 2322, —— F. 2d at —— (No. 17166,

7/7/69). The announcement of this new constitutional standard was accompanied by a vigorous dissent.* The Court of Appeals rejected the Illinois Supreme Court's "waiver by conduct" formulation and held that such a rationale was inconsistent with this Court's opinion in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). Petitioner contends that *Johnson* does not dictate the outcome in the Court below, and in fact, supports the conclusion reached by the Illinois Supreme Court. Certiorari should be granted to resolve the issue. The effective administration of criminal justice requires the Court's consideration of the point presented in this case. On that basis alone, certiorari should be granted. Cf. *Carbo* v. *United States*, 364 U.S. 611 (1961), where certiorari was granted to determine the power of a United States District Court to issue a writ of *habeas corpus ad prosequendum* to a prison official in another state, and *Pollard* v. *United States*, 352 U.S. 354 (1957), where the Court agreed to review the propriety of certain sentencing procedures.

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*". . . then imagine the result that may occur in a criminal trial of multiple defendants who determined 'to raise hell' and disrupt the trial to the point of no return. Shackles, chains, gags and a courtroom full of deputy marshalls engaged in trying to keep the defendants off the floor may prove to be the climax following the proper course. I cannot believe the Federal Constitution requires that any such farce take place." ——F. 2d at —— (No. 17166, 7/7/69).

Parenthetically, Petitioner would point out that on more that one occasion a trial court's decision to follow the "proper course," as announced by the Court of Appeals, has culminated in reversal because the resulting show of force made a fair trial impossible. See, for example, *Dennis* v. *Dees*, 278 F. Supp. 354 (D.C. La. 1968).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 17166

UNITED STATES OF AMERICA *ex rel.*, WILLIAM ALLEN,

Petitioner-Appellant,

v.

STATE OF ILLINOIS,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

JULY 7, 1969

Before HASTINGS, *Senior Circuit Judge.* KILEY and SWYGERT, *Circuit Judge.* This is an appeal from the district court's dismissal of a habeas corpus petition filed by William Allen who is presently serving a ten to thirty year sentence in the Illinois State Penitentiary. The sentence was imposed by the Criminal Court of Cook County following the petitioner's conviction for armed robbery.

The question presented is whether the petitioner was denied his constitutional rights under the sixth amendment

by reason of his forceable exclusion from the courtroom during part of his trial.

After his indictment and during the pretrial stage, the petitioner refused court-appointed counsel and indicated to the trial court on several occasions that he wished to conduct his own defense. After considerable argument by the petitioner, the trial judge told him, "I'll let you be your own lawyer, but I'll ask Mr. Kelly [court-appointed counsel] [to] sit in and protect the record for you, insofar as possible."

The trial began on September 9, 1956. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying, "When I go out for lunchtime, you're [the judge] going to be a corpse here." At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, "One more outbreak of that sort and I'll remove you from the courtroom." This warning had no effect on the petitioner. He continued to talk back to the judge, saying, "There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial." After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire

examination then continued and the jury was selected in the absence of the petitioner.

After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he "behaved [himself] and [did] not interfere with the introduction of the case." The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The defendant protested this effort on the part of his attorney, saying: "There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me." The trial judge thereupon ordered the petitioner removed from the courtroom. The petitioner was again taken out of the courtroom and the trial proceeded. He was kept from the courtroom throughout the presentation of the prosecution's case except to be brought into the courtroom on four separate occasions in order to be identified by different witnesses. On each occasion he was immediately removed after the identification.

The petitioner was permitted in the courtroom during the presentatioin of his defense which was conducted by the appointed counsel.

In a consolidated appeal from the petitioner's conviction and a dismissal of his post-conviction petition in regard thereto, the Illinois Supreme Court affirmed. *People* v. *Allen*, 37 Ill. 2d 167, 226 N.E. 2d 7 (1967). Certiorari was denied by the Supreme Court. *Allen v. Illinois*, 389 U.S. 907 (1967).

A defendant in a criminal proceeding has the unqualified right to be personally present at all stages of his trial. *Hopt* v. *Utah*, 110 U.S. 574 (1884); *Shields* v. *United States*, 273 U.S. 583 (1927). Although the Supreme Court

has indicated that this right cannot be waived either by a defendant or his counsel, *Lewis* v. *United States*, 146 U.S. 370 (1892), there may be instances when a defendant who voluntarily absents himself from a trial effects a waiver of this right. For example, in *Parker* v. *United States*, 184 F.2d 488 (4th Cir. 1950), the defendant was injured in an automobile accident during his trial. Neither the court nor counsel knew of the accident and assumed that the defendant had misunderstood the hour when court convened or had been temporarily delayed. The defendant's counsel suggested that the trial proceed and five witnesses were examined before it was learned that the defendant's absence had been caused by his injuries. The Fourth Circuit held that since the defendant had immediately been furnished a transcript of the five witnesses' testimony and did not object to their testimony or request that they be examined further, he voluntarily waived his right to be present during their examination. Certainly, if a defendant in a criminal case absconds during his entire trial or voluntarily and without excuse absents himself from the courtroom, he may waive his right to be present. But that is not this case. Here the defendant repeatedly demanded that he remain in the courtroom and on both occasions objected to his exclusion.

The Supreme Court of Illinois viewed the offensive conduct of the defendant as constituting a waiver of "any [of his] constitutional rights to be present, [and] confront the witnesses against him. . . ." We respectfully disagree. A waiver, whether express or implied, denotes a voluntary, intentional relinquishment of a known right. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). It is essentially unilateral in character. A relinquishment of rights by waiver that is compelled by an election of choices is involuntary and not a waiver at all. The choice given the petitioner in the instant case by the trial judge, either to behave or be expelled from the courtroom, compelled the petitioner to involuntarily "waive" a constitutional right. No conditions may be imposed on the

absolute right of a criminal defendant to be present at all stages of the proceeding. The insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver. Such conditions, if insisted upon, should and must be dealt with in a manner that does not compel the relinquishment of his right.

In light of the decision in *Hopt* v. *Utah,* 110 U.S. 574 (1884) and *Shields* v. *United States,* 273 U.S. 583 (1927), as well as the constitutional mandate of the sixth amendment, we are of the view that the defendant should not have been excluded from the courtrrom during his trial despite his disruptive and disrespectful conduct. The proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged. *United States* v. *Bentvena,* 319 F.2d 916 (2d Cir.), *cert. denied,* 375 U.S. 940 (1963); *People* v. *Loomis,* 27 Cal. App. 2d 236, 80 P. 2d 1012 (1938).[1]

Although we sympathize with the plight of the judge in the instant case and think he showed commendable patience under severe provocation, we nonetheless are of the opinion that he interfered with the defendant's constitutional rights. For that reason, we are compelled to hold that the petitioner's conviction is invalid.

The Court expresses its appreciation to H. Reed Harris, a member of the Illinois bar, for his excellent services as court-appointed counsel for the appellant.

The dismissal order of the district court is reversed.

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1 An additional technique available to the trial judge for controlling the defendant's behavior was his contempt power.

No. 17166—*USA ex rel. Allen* v. *Illinois*

HASTINGS, *Senior Circuit Judge* dissenting.

With deference to the distinguished majority, I feel compelled to dissent from its holding in this case. The majority opinion correctly recites the factual situation concerning petitioner Allen's gross misconduct during his trial in the Criminal Court of Cook County, Illinois. I read the constitutional mandates applicable thereto in a light different from my brethren.

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." Defendant was given that right in this case, but made his own free choice to voluntarily reject his enjoyment of it.

The majority mildly characterizes the trial judge's admonition to the defendant as "either to behave or be expelled from the courtroom." Later it recognizes the extremes to which the judge went to preserve some semblance of order in the court. My reading of the undisputed facts indicates to me that defendant was brazenly determined to make a shambles of the criminal judicial process, unless he was permitted to dictate the rules of the game. Witness his threat, after much preliminary blatant misconduct, including a warning to the trial judge that at lunchtime the judge was "going to be a corpse here", when he said:

> "There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial."

Later, at his request, defendant was permitted to be present in court again, and made a similar threat to the judge that he would prevent the trial from proceeding.

The majority states that a "defendant in a criminal proceeding has the unqualified right to be personally present at all stages of the trial," and concludes as a matter of law that "No conditions may be imposed on

the unqualified right of a criminal defendant to be present at all stages of the proceedings." I cannot accept the thesis that such an unconditional unqualified right in all criminal cases flows from the constitutional mandate of the Sixth Amendment.

The majority then proposes this unusual remedy for such an intolerable situation,—"The proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included "his being shackled and gagged." We all recognize that shackling and gagging a defendant has been judicially approved in certain circumstances. However, I respectfully suggest that such an after the fact holding on appeal is a far cry from the holding here that the failure of the trial judge to take such steps constituted such an interference with the defendant's constitutional rights as to invalidate his conviction.

I further suggest that if the majority holding becomes a prevailing constitutional precedent, then imagine the result that may occur in a criminal trial of multiple defendants who determined "to raise hell" and disrupt the trial to the point of no return. Shackles, chains, gags and a courtroom full of deputy marshals engaged in trying to keep the defendants off the floor may prove to be the climax in following "the proper course." I cannot believe the Federal Constitution requires that any such farce take place.

Neither can I believe that the Sixth Amendment's grant to an accused that he "shall enjoy the right" carries with it an unqualified right to have it on his own terms and that no conditions may be imposed thereon. Thus, the majority in effect says that a defendant has a right to be present at his trial and at the same time rules that the bedevilled trial judge must enforce this right upon the defendant by violent physical means, if necessary.

The majority puts forward a footnote alternative that an additional technique available to the trial judge for controlling the defendant's behavior is the use of the

court's contempt power. I fail to see how the threat of punishment for contempt would restrain those determined to destroy the trial proceeding in progress. Defendant and his kind could care less.

The majority opinion properly recognizes those cases holding that a defendant who voluntarily absents himself from a trial effects a waiver of his right to be present. I find myself in agreement with the Supreme Court if Illinois, in upholding defendant's conviction, when it equates a voluntary absence from the trial with circumstances leading to this defendant's involuntary absence. *People* v. *Allen*, 37 Ill. 2d 167 (1968). In either situation, a defendant by his own action brings about his absence from the trial.

Under the facts of this case, I would hold that the state trial judge did not err in his conduct of defendant's trial and that the district court properly dismissed defendant's petition for a writ of habeas corpus. I would affirm.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 606

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM ALLEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 606

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM ALLEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 413 F. 2d 232 (1969). Appendix, page 59.

JURISDICTION

The jurisdiction of this Court is invoked to review a final judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254 (1). The judgment of the court below was entered on July 7, 1969. A petition for rehearing *en banc* was denied on August 12, 1969. The Petition for Writ of Certiorari was filed September 17, 1969, and granted December 8, 1969.

CONSTITUTIONAL PROVISION

Sixth Amendment to the United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

QUESTION PRESENTED FOR REVIEW

Whether a defendant waives his right to be present at trial by deliberate and disruptive conduct which necessitates his removal from the courtroom.

STATEMENT OF THE CASE

The facts in the instant case, as developed in the opinions of the Supreme Court of Illinois, *People* v. *Allen*, 37 Ill. 2d 167, 226 N.E. 2d 1 (1967), and the Court of Appeals below, *United States ex rel. Allen* v. *Illinois*, 413 F. 2d 232 (7th Cir. 1969), are not in dispute.

On August 12, 1956, William Allen, respondent herein, entered a tavern and, after ordering a drink, took $200 from the bartender at gunpoint. He was later arrested and identified by the bartender. Allen, in turn, identified the bartender as his victim.

Respondent was subsequently indicted, convicted of armed robbery, and was sentenced to serve ten to thirty years in the Illinois State Penitentiary.

Allen's trial commenced on December 11, 1957. The defense was to be insanity.*

Prior to trial, the respondent expressed dissatisfaction with the public defender and, after refusing court-appointed counsel, did not retain private counsel as he stated he would. Thereafter, Allen was offered the choice of the public defender or an attorney from the bar association defense committee. He refused both and requested the appointment of one from a list of attorneys he presented. The trial judge denied this request and informed respondent that a lawyer from the bar association would be appointed. Thereupon Allen became adamant in his request

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* In a 1956 pre-trial hearing, the respondent had been found incompetent to stand trial. Later, on October 19, 1957, in a subsequent hearing, Allen was declared competent to stand trial in a proceeding where he was represented by the public defender.

that he be allowed to represent himself despite the repeatedly expressed concern of the court about his ability to defend himself. The court finally acceded to Allen's demand, but in addition appointed a bar association attorney to assist and advise the respondent.

During the *voir dire* examination of the first prospective juror by the respondent—throughout which Allen had asked many irrelevant questions and indicated a lack of knowledge of the law and procedure (A. 10-19)—the trial judge instructed Allen to confine his questions solely to juror qualifications (A. 20).

Thereafter, when the court suggested that counsel take over the examination, Allen proceeded to argue with the judge in a ". . . most abusive and disrespectful manner". 413 F. 2d 232, 233. This was to culminate in a threat by the respondent that he would begin ". . . ranting in the courtroom . . ." and a subsequent warning by the judge that Allen would be permitted to be present only if he conducted himself properly (A. 24-25).

The respondent continued to talk and terminated his remarks by stating: "When I go out for lunch time, you're [the judge] going to be a corpse here" (A. 25). Allen then tore the file which his attorney had and threw the papers on the floor (A. 25). A second warning was to follow, but Allen persisted in his unruly and contemptuous remarks, threatened to disrupt the trial (A. 26), and the court finally ordered the respondent removed from the courtroom and directed the appointed counsel to proceed in Allen's behalf (A. 26-27).

After the selection of the jury the respondent was invited to return (A. 29) and although the trial judge was unable to obtain a commitment to proper conduct (A. 31), he allowed Allen to remain in the courtroom (A. 32).

Immediately upon commencement of the trial, the respondent provoked another clash with the court and his second removal occurred (A. 33). After this exclusion he remained out of the court during the presentation of the state's case in chief, except when brought in for purposes of identification. During one of these latter appearances Allen was to swear at the court while demanding his right to be present at trial (A. 38).

Before the beginning of the defense, the trial judge again offered Allen the opportunity to remain in the courtroom (A. 43). Despite only limited assurances of proper conduct, Allen was permitted to be present through the remainder of the trial.

Allen's conviction was affirmed by the Supreme Court of Illinois, 37 Ill. 2d 167, 226 N.E. 2d 1 (A. 50); and the Court denied certiorari. *Allen* v. *Illinois,* 389 U.S. 857 (1967). Allen's habeas corpus petition was denied by the United States District Court for the Northern District of Illinois on May 24, 1968 (A. 56). On July 7, 1969, the Court of Appeals reversed that judgment with one judge dissenting. *United States ex rel. Allen* v. *Illinois,* 413 F. 2d 232 (7th Cir. 1969) (A. 59).

SUMMARY OF ARGUMENT

From the earliest days of common law, a defendant in a criminal case has enjoyed the right to be present throughout all stages of his trial. This right is also guaranteed against state and federal deprivation by the Confrontation Clause of the Sixth Amendment, although this Court has held that the adoption of the Amendment was not intended to change the nature of the right, or the

qualifications of its exercise, as they existed at common law.

This Court, and the courts of almost all jurisdictions, have held that the right to be present at trial is one which can be waived by the words or actions of the defendant. Both the cases and the commentators have recognized the proposition that a defendant whose disorderly conduct compels his removal from the courtroom impliedly waives his right to be present at his trial so long as such conduct persists, and that involuntary expulsion under these circumstances does not violate the Sixth Amendment or the right of confrontation as it existed at common law.

A trial court confronted with an unruly defendant may employ any one of three sanctions to compel obedience to order in the courtroom: (1) contempt, (2) physical restraint, or (3) expulsion. The rule which this Court ought to promulgate in the administration of the Sixth Amendment guarantee is one of discretion, that is, that a trial judge ought to be able to decide which sanction to employ in light of the particular interests, of both the defendant and the state, involved in the case then on trial. Such discretion was exercised by the court which tried respondent Allen, and that court properly concluded that expulsion was the appropriate sanction to be employed in the circumstances of this case since the threat of contempt was of little significance and the employment of shackles and a gag might have unfairly prejudiced the state and respondent.

ARGUMENT

The Sixth Amendment Was Not Violated When Respondent Was Excluded From The Courtroom During Portions Of His Trial Because He Waived The Right To Be Present By His Repeated And Flagrant Disruption Of The Proceedings.

> *"The Defendant: You have the right to restrain me, but you haven't got the right to remove me and you're not going to remove me.*
>
> *The Court: I'll determine that.*
>
> *The Defendant: No, you're not. There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial."*•

A.

The Right Of Confrontation In Historical Perspective

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

• Appendix, p. 26.

> to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The relevant portion of the Amendment which insures the defendant's right to be present through all stages of his trial is the Confrontation Clause—"to be confronted with the witnesses against him." To understand the scope and application of the guarantee, however, it is necessary to understand the right as it existed at common law, for as this Court has said on many occasions, "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common law right having recognized exceptions. The purpose of the provision . . . is to continue and preserve that right, and not to broaden it or disturb the exceptions."[1]

The genesis of the rule is to be found in the early common law requirement that no trial for felony could be had in the absence of the defendant. At that time, the rule was cast in jurisdictional terms, *i.e.*, the defendant's presence was necessary to the case and could not be waived.[2]

Importantly, the early rule has also been described in terms of recognizing interests of the state in the presence of the accused at trial. Thus Bishop has stated:

> ". . . subject to exceptions and qualifications, . . . an indicted person must be present in court whenever any essential thing is done against him. The reasons

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1. Salinger v. United States, 272 U.S. 542, 548 (1926).

2. State v. Greer, 22 W. Va. 800, 811 (1883); Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679, 681 (1923). The rule was less strict as to misdemeanors. People v. Beck, 305 Ill. 593, 137 N.E. 454, 457 (1922); State v. Rabens, 79 So. C. 542, 60 S.E. 442, 445 (1908).

> are two; first, to enable the prosecuting power to identify him, and to inflict on him the pronounced punishment; secondly, to secure to him full facilities for defense. The one reason is in the interest of the State, the other, of the defendant. And these differing reasons, we shall see, are sometimes dissimilar in their effects upon a particular argument or question."[3]

As the rule developed, exceptions came to be recognized, both before and after the adoption of the Sixth Amendment. Thus defendant's right to "confront" the witnesses against him did not bar the admission of dying declarations,[4] documentary evidence,[5] or the affidavits of witnesses whose absence from the trial had been wrongly procured by the defendant.[6]

More importantly, insofar as the right to physical presence at trial is concerned, whether or not guaranteed by the Confrontation Clause in a particular case, two trends in the decisional law can be clearly noted.

First the rule of presence lost its jurisdictional character. Most courts began to hold that a defendant could waive his right to be present at the trial of a felony case.[7]

---

3. 1 BISHOP'S NEW CRIMINAL PROCEDURE, p. 174 (4th ed. 1895). See also: McCorkle v. State, 14 Ind. 39 (1859).

4. State v. Bethea, 241 So. C. 16, 126 S.E. 2d 846, 849 (1962).

5. Tucker v. People, 122 Ill. 583, 13 N.E. 809, 812 (1887); People v. Jones, 24 Mich. 214, 225 (1872).

6. Reynolds v. United States, 98 U.S. 145, 158 (1878).

7. Diaz v. United States, 223 U.S. 442, 455-58; Scruggs v. State, 131 Ark. 320, 198 S.W. 694, 696 (1917); People v. Harris, 302 Ill. 590, 135 N.E. 75, 76-77 (1922).

And waiver was found not only in those cases where a defendant simply refused to participate further in the trial, and said so,[8] but also in those cases where it could be inferred from his *conduct, e.g.,* where a bailed defendant abandoned the cause or a prisoner escaped from custody during trial.[9]

An extensive examination of the principle of waiver was undertaken by this Court in *Diaz* v. *United States,* 223 U.S. 442 (1912). In that case the accused left the court in the middle of trial and sent back a message that he expressly consented to the continuation of the trial in his absence. After conviction, it was contended in this Court that:

> "the objection now made is, not that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence."[10]

The answer to this contention, the Court found, was to be determined by the meaning of §5 of the Philippine Civil Government Act, "securing to the accused in all criminal prosecutions 'the right to be heard by himself

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8. Diaz v. United States, 223 U.S. 442 (1912).

9. Sahlinger v. People, 102 Ill. 241, 247 (1882); United States v. Noble, 294 F. 689, 692 (D. Mont. 1923), *aff'd.,* Noble v. United States, 300 F. 689, 692 (9th Cir. 1924); United States v. Loughery, 26 Fed. Cas. 998 (No. 15, 631) (C.C.E.D., N.Y. 1876); Falk v. United States, 15 App. D.C. 446, 455-61 (1899).

10. 223 U.S. at 453.

and counsel' " which, the Court said, was the "substantial equivalent" of the Sixth Amendment.[11]

In construing the scope of the Confrontation Clause, the *Diaz* Court agreed with the great weight of state and federal authority which had held that,

> "the prevailing rule has been, that if, after the trial has begun in his presence, he [the defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."[12]

The reason for the rule, the Court said, was that " 'otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered',[13] . . . neither in criminal nor in civil cases will the law allow a person to take advantage of his wrong . . . yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield."[14]

Lastly, the Court found no bar to such a holding despite earlier, and seemingly contrary, language in *Hopt* v. *Utah,* 110 U.S. 574 (1884) and *Lewis* v. *United States,* 146 U.S. 370 (1892). In both of those cases, the Court noted, "the

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11. 223 U.S. at 454-458.

12. 223 U.S. at 455.

13. 223 U.S. at 456, quoting with approval from Barton v. State, 67 Ga. 653 (1881).

14. 223 U.S. at 458, quoting with approval from Falk v. United States, 15 App. D.C. 446 (1899).

accused was in custody, charged with a capital offense, and was sentenced to death." In *Hopt*, the Court construed a territorial statute which declared that he "'*must* be personally present'" and the *Diaz* Court read the *Hopt* opinion as holding that the defendant could not, therefore, waive what was in effect a jurisdictional bar to the continuation of a trial in the absence of the defendant. The holding of *Lewis*, said the *Diaz* Court, was simply that it was error to exclude a defendant during the time when challenges were made to the seating of jurors and the defendant had properly and timely objected to proceeding in his absence.[15]

In sum, then, a historical perspective of the right of confrontation insofar as it is guaranteed by the Sixth

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15. 223 U.S. at 458. The force of the *Hopt* and *Lewis* holdings was further diminished by Mr. Justice Cardozo, writing for the Court in Snyder v. Massachusetts, 291 U.S. 97 (1934), who said that "*Hopt* v. *Utah* . . . has been distinguished and limited" (291 U.S. at 106) and "what was said in *Hopt* v. *Utah* . . . on the subject of the presence of a defendant was dictum, and no more . . . We may say the same of *Lewis* v. *United States* . . . with the added observation that it deals with the rule at common law and not with constitutional restraints." (291 U.S. at 117, ft.).

The failure to recognize the defects of *Hopt* and *Lewis* is what led the majority of the Court of Appeals below into error in voiding the conviction of Allen. For the decision below reverses "in light of" these opinions, together with Shields v. United States, 273 U.S. 583 (1927). See Appendix 62-63. *Shields* holds merely that "the rule of orderly conduct of jury trial" entitles a defendant to be present when additional instructions are given to the jury. The Sixth Amendment was in no way involved, or even discussed, and the *Shields* Court cited only a civil case in support of its holding. See 273 U.S. at 588-89.

Amendment,[16] and at common law, both before and after the adoption of the Amendment, shows that (1) the presence of a defendant was once a jurisdictional requisite to the trial of all felony cases, (2) this strict rule is now applied only in capital cases,[17] (3) a defendant may waive, by word or deed, his right to be present in all other felony cases, and (4) such waiver may be expressed or implied.[18]

B.

The Power Of A Trial Court To Expel An Unruly Defendant.

We turn now to an examination of the principle directly at issue in this case: Can a defendant in a noncapital felony case waive his right to be present during portions of his trial when his contumacious conduct compels the trial judge to expel him so that the trial may proceed in an orderly fashion?[19] Or is a finding of

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16. Now enforcible directly against the states through the vehicle of the Due Process Clause of the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400 (1965).

17. But see People v. De Simone, 9 Ill. 2d 522, 138 N.E. 2d 556 (1956).

18. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).

19. We do not argue here the questions (1) whether Allen's conduct was sufficiently disturbing to require expulsion, assuming the trial court possessed such a power, and (2) whether alternative remedies might have been more properly employed. Those points are discussed *infra* at pp. 23-28 and 19-22.

"waiver" under these circumstances precluded by the Confrontation Clause of the Sixth Amendment?

When the Supreme Court of Illinois affirmed Allen's conviction on direct appeal, it did so on the basis of its prior opinion in *People* v. *De Simone*, 9 Ill. 2d 522, 138 N.E. 2d 556 (1956). The *De Simone* opinion, upholding the exclusion of a contumacious defendant, relied upon past Illinois cases which, although clearly consistent with the decisions of this Court,[20] dealt only with the voluntary absence of a defendant.

When the case was collaterally examined, after a habeas petition was filed in the District Court, apparently the research below did not disclose the existence of any direct precedent and the cause was dealt with by the habeas judge, the majority of the Court of Appeals, and the dissenting judge there, as a case of first impression, to be decided by reason and analogy.[21]

But precedent—long recognized, sound and respectable precedent—does exist.

From early days, *and without dissent*, the right of a defendant to be present at all stages of his trial has been qualified by the exception that such right is waived when the courtroom behavior of the defendant is so disturbing as to compel his removal and the continuation of the trial during his absence.

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20. For example, Sahlinger v. People, 102 Ill. 241 (1882), upon which the *De Simone* court relied (9 Ill. 2d at 533), was cited with approval in Diaz v. United States, 223 U.S. 442, 455 (1912).

21. The precedents of People v. De Simone, 9 Ill. 2d 522, 138 N.E. 2d 556 (1956) and People v. Allen, 37 Ill. 2d 167, 226 N.E. 2d 1 (1967), of course, aside.

This qualification was first recognized by the famous English authority on criminal law, Sir James Fitzjames Stephen, who said that:

> "If a prisoner so misconducts himself as to make it impossible to try him with decency, the Court, it seems, may order him to be removed and proceed in his absence."[22]

This view has been reiterated time and again by both the English and American commentators who unanimously recognize such a power in the trial court.[23]

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22. Stephen's Digest of Criminal Proced., Art. 302 (1883).

23. "In cases where the defendant may waive his right to be present, if his conduct is such that it is necessary to remove him temporarily from the courtroom, such temporary absence will not affect the validity of the trial", Clark's Criminal Procedure, §148, p. 495 (Mikell ed. 1918); "No trial (a) for felony can be had except in the presence of the defendant, and he must, it is said, stand in the dock to be tried. . . . If he creates a disturbance it is said that the trial may go on without his presence", Archbold's Criminal Pleading, Evidence and Practice, p. 179 (Ross & Butler, 28th ed. 1931); "In cases of felony the prisoner must be in the dock during the whole of the trial unless he is so violent as to render a trial in his presence impossible", Harris & Wilshere, Criminal Law, p. 396 (14th ed., London 1933); "Disorderly conduct of the prisoner at the trial, such in degree that it cannot go on, has been held to justify the court in removing him, and proceeding in his absence", 1 Bishop's New Criminal Procedure, p. 179 (4th ed. 1895); "It is perfectly clear that the accused has a right to be present in court throughout his trial although there is some authority for the proposition that the defendant may be excluded from the courtroom, and the trial may

Moreover, there are decided cases, again both English and American, which are precisely in point and, again, are unanimous in upholding the power of a trial court to expel an unruly defendant if his conduct precludes the possibility of an orderly trial.

The principle was apparently first propounded in a reported case in *United States* v. *Davis*, 25 Fed. Cas. 773 (No. 14, 923) (C.C.S.D., N.Y. 1869).

In *Davis*, the defendant, a prisoner in custody, had been indicted for perjury and, after selection of the jury, repeatedly interrupted the opening statement of the District Attorney, despite admonishments by the court. When he persisted in such conduct he was ordered removed from the courtroom despite the objection of his counsel and the trial resumed. On the next day, "the defendant having become composed", the case concluded. On a motion for new trial the defendant urged his involuntary removal from the courtroom as error. In denying the motion, the District Judge held:

> "This statement [of the facts] seems sufficient to dispose of the point in question. The right of a

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go on without him, if he persistently creates disturbances and disrupts the trial", FELLMAN, DEFENDANT'S RIGHTS UNDER ENGLISH LAW, p. 68 (U. WIS. PRESS 1966); BOWEN-ROWLAND, CRIMINAL PROCEEDINGS ON INDICTMENT AND INFORMATION (2d ed., Stevens & Sons, Lt., London 1910); MURRAY, *The Power To Expel A Criminal Defendant From His Own Trial: A Comparative View*, 36 U. COLO. LAW REV. 171 (1964). The only contrary suggestion is to be found in ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, p. 414 (1947), where it is said that "possibly the better course, even in such a case, is to put the defendant under whatever restraint is necessary to allow the trial to continue", although the precedent of expulsion is also recognized.

prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance. The defendant had the opportunity to be present at the whole of his trial. He was, in fact, present while the jury were being empanelled and the evidence was being introduced. He was absent during a part of the opening, only because of his own disorderly conduct. It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying his willingness to avoid creating disturbance."[24]

The question was next raised in *Regina* v. *Berry,* 104 L.T.J. 110 (Northhampton Assizes 1897), where the court removed a defendant, on trial for burglary, who tore off his clothing, struggled with the wardens, and uttered "loud cries, which, so far as they were understood, were totally irrelevant to the charge."

In *Rex* v. *Browne,* 70 J.P. 472 (London Cent. Crim. Ct. 1906), the defendant, accused of obtaining property by false pretenses, screamed and shouted in the dock after being warned that the trial would proceed in her absence if she persisted. She did persist, was removed from the courtroom and the trial continued. The trial judge held that there was "quite sufficient authority for this course", relying upon the authority of Sir James Stephen, *Regina* v. *Berry,* and an earlier unreported case before Lord Blackburn on the Western Circuit.

Though all of the reported case authority was decided by trial courts, two propositions lend added weight to their force as precedent. First, there are no contrary cases on point. No court, trial or appeal, has ever held the involuntary expulsion of an unruly defendant to be

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24. 25 Fed. Cas. at 774.

error, constitutional or otherwise. Second, the correctness of the views of the case authority and the commentators has been explicitly suggested by this Court.

In *Diaz* v. *United States*, 223 U.S. 442 (1912), this Court cited with approval the case of *Davis* v. *United States* for the proposition that if a defendant "voluntarily absents himself, this . . . operates as a waiver of his right to be present and leaves the court free to proceed. . . ."[25] Since the principle of voluntary absence was neither involved nor discussed in *Davis*, the *Diaz* Court must have concluded that *involuntary* absence for contumacious conduct was the equivalent of *voluntary* absence insofar as the reach of the Sixth Amendment was concerned.[26]

That this is so was made clear by Mr. Justice Cardozo, writing for the Court in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934). Prefacing his discussion of whether a jury view of the scene in the absence of the defendant, and over his objection, violated the Confrontation Clause, Justice Cardozo declared that though the right of confrontation was guaranteed by both the federal and state constitutions, there was "*no doubt* the privilege may be lost by consent *or at times even by misconduct.*"[27] The legal effect of exclusion for misconduct, the opinion concluded, was an "imputed waiver" of the Sixth Amendment right to be present throughout the trial. In support of this conclu-

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25. 223 U.S. at 455-56.

26. This, of course, was precisely the reasoning and holding of People v. DeSimone, 9 Ill. 2d 522, 533, 138 N.E. 2d 556 (1956), the precursor of *Allen*. See text, *supra*, at p. 14.

27. 291 U.S. at 106 (Emphasis added.)

sion, the Court cited *Diaz* and Sir James Fitzjames Stephen, Digest of the Law of Criminal Procedure, Art. 302.[28]

Throughout the course of Anglo-American criminal jurisprudence, therefore, it has been uniformly held—in the cases and by the commentators, with the repeated and explicit approval of this Court—that the Sixth Amendment does not preclude the involuntary removal of a defendant who, by his conduct in the courtroom, asserts a right to destroy the orderly pursuit of justice.

C.

The Rule Of Discretion And The Contumacious Defendant.

If the federal constitution does not in all cases mandate the continued presence of a contumacious defendant, then what rule ought this Court administer in the enforcement of the Sixth Amendment guarantee? We have concluded that, by reason and authority, the rule is one of discretion—to be fitted to the facts of each case in the light of the interests involved.

There are, in theory, three sanctions available to a court faced with the disruption of a trial by a defendant who refuses to respect the dignity and decorum of the courtroom: (1) the summary punishment of contempt; (2) physical restraint, including the presence of guards, shackling and gagging; (3) removal from the courtroom.[29]

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28. 291 U.S. at 106. *Diaz,* it will be remembered, had, in turn, cited with approval the *Davis* case—the first reported decision upholding the power of a trial court to expel an unruly defendant.

29. See the discussion in Murray, *The Power To Expel A Criminal Defendant From His Own Trial: A Comparative View,* 36 U. Colo. L. Rev. 171-72 (1964).

The contempt sanction, of course, does not conflict at all with the right to be present at trial. And its use, or even its threat, may, in some cases, be sufficient to dissuade the unruly defendant. And, if so, restraint of the defendant would be, for state law purposes, reversible error, and expulsion would be, for federal constitutional purposes, inconsistent with the protections of the Sixth Amendment.

But cases can easily be hypothesized where the threat, or even the employment, of a contempt citation will little avail a judge faced with a defendant determined to mock the judicial process. For the power of a trial judge to summarily punish for contempt is not unlimited.

The punishment which may be imposed can pale to insignificance when compared with the sentence which the defendant may receive if convicted of the substantive offense charged.[30] It has never before been thought that the Constitution of the United States even suggests, much less compels, this spectacle of judicial impotence in the face of a threat to the orderly administration of justice, without which no rights can be respected or enforced.

The usual case of disruption, or the threat of violence or escape, may be deterred or overcome by the employment of guards or handcuffs. The presence of guards, however, will not deter the defendant who seeks, not to escape, but on the contrary, to remain in the courtroom and disrupt the proceedings by shouts and interruptions,

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30. For example, the trial judge here could have sentenced the respondent Allen, if convicted of robbery, to a sentence of one year to life in the penitentiary. See Ch. 38, §501 Ill. Rev. Stat. (1955).

unless continued physical violence to his person is to be the rule. The use of handcuffs or similar restraints will be of no value in enforcing a condition of order and quietude. And so the trial judge may be compelled to escalate the use of force by gagging as well as shackling.

This course, though it has the approval of some courts,[31] and was mandated as the only constitutional alternative by the court of appeals below, may have several severely prejudicial consequences.

First, the employment of shackles and gags may so revolt a jury that its sympathies are necessarily turned to the defendant's favor, contrary to, and in diminution of, the force of the evidence which the state has marshalled against the accused. This is a high, indeed an intolerable, and, quite unnecessary, price to pay for the guarantee of the right to confront one's accusers.[32]

Second, the conduct of the defendant may be so extreme as to require the employment of restraints to the degree that a defendant is totally immobile and speechless. Only the most slavish reading of the Sixth Amendment could justify such a course on the ground that this does not violate the right of confrontation, though exclusion would. To say that a defendant, bound and

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31. State v. VanBogart, 85 Ariz. 63, 331 P. 2d 597, 599, 600 (1958); United States v. Bentvena, 319 F. 2d 916, 930 (2d Cir. 1963).

32. It is also ironic in light of the early view that the right of confrontation existed for the benefit of the state as well as the accused. See text, *supra*, at p. 8-9.

gagged, may meet his accusers face to face, while the excluded defendant is denied this opportunity is nonsense."[33] Moreover, this extreme course, where improperly employed, would at once violate not only the Sixth Amendment, but would also diminish the right of the state to a fair trial free from the wrath of a jury who cannot turn its eyes away from the writhing mute in the defendant's seat.

This leaves the third alternative of expulsion. Admittedly, this course is most at odds with the right of confrontation, save for those cases where physical restraint renders a defendant both silent and immobile. But if the Sixth Amendment does not forbid it, as we have demonstrated, its employment accomplishes at least two desirable results—the end of the disruption of the judicial process, and the avoidance of jury hostility to the prosecution. Moreover, as this case readily demonstrates, the defendant remains free to end his absence at the precise moment he signifies that he is willing to respect the orderly administration of justice.

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33. The words of the earliest commentators, in explaining the right of defendants to appear unfettered in courts of justice, are especially apt here. "The prisoner is to be brought to the bar without irons, shackles, or other restraint, unless there is danger of escape; and 'ought to be used with all humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances' . . . 'they [felons] shall be out of irons and all manner of bonds, so that their pains shall not take away any manner of reason, nor constrain them to answer but at their free will,'" ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, p. 173 (Ross & Butler, 28th ed. 1931).

When the sanctions available—contempt, restraint, and removal—are employed by a trial court which has in mind the interests involved—the right of the accused to be present, including the opportunity to confer with counsel and participate in the decisions of the trial; the right of the state to a fair trial free from the involuntary production of jury sympathy for the fettered accused; the right of the defendant to a fair trial free from the hostility of a jury toward an accused who is thought to be violent or dangerous; and the basic necessity of a trial free from disorderly interruption and spectacle—it must be concluded that the only rule to be followed is one of discretion in the trial court to fit the sanction to the situation, subject, of course, to review by this Court in cases of abuse of discretion which transgresses constitutional limits.

Such a rule is followed in Illinois. Such a rule was employed by the trial court whose decision is now on review here. And, as we shall now demonstrate, such discretion was properly exercised in this case.

D.

The Respondent Allen Was Properly Expelled For His Conduct.

The respondent Allen during both his pretrial and trial appearances clearly presented his intentions regarding the administration of criminal justice in his cause.

The Supreme Court of Illinois, in reviewing both the respondent's actions at trial and his absolute constitutional claim to presence at his trial, regardless of personal conduct, concluded that the record ". . . is replete with rude, boisterous and disrespectful conduct of the defend-

ant toward the court and its orders" and that the "trial judge was both patient and tolerant."[34]

With these findings there can be no dispute. The Court of Appeals for the Seventh Circuit also deemed respondent's trial behavior to have been both "disputive and disrespectful" and stated that it could ". . . sympathize with the plight of the judge in the instant case and think he showed commendable patience under severe provocacations. . . ."[35]

Turning to the trial record in this matter, it soon becomes eminently clear why these two courts of review concluded as they did with respect to the respondent's conduct.

During the *voir dire* examination of the first prospective juror by the respondent, and after the asking of many irrelevant questions, the trial judge requested that Allen confine his inquiry solely to juror qualifications. Allen began to argue with the judge in what the Court of Appeals characterized as a ". . . most abusive and disrespectful manner."[36] This dialogue was to include the following threat and subsequent warning:

> The Defendant: There's no trial. If you try to make me sit down, there is going to be ranting in the courtroom and you'll have to carry me out, and I want to be present here at my trial all through the trial. I'm going to talk.
>
> The Court: You will be permitted to be present at this trial.
>
> The Defendant: That's right.

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34. 226 N.E. 2d at 3.

35. 413 F.2d at 235.

36. 413 F.2d at 233.

The Court: (Continuing)—so long as you conduct yourself in accordance with the law and with the dignity and propriety of the court and no longer (A. 24-25).

After further informing the court that he, Allen, was not going to remain quiet (A. 25), the respondent terminated his remarks by saying: "When I go out for lunch time, you're [the judge] going to be a corpse here" (A. 25). At this point Allen tore the file which his attorney had and threw the papers on the floor (A. 25). The trial judge then stated to the respondent: "One more outbreak of that sort and I'll remove you from the courtroom" (A. 25). Despite this second warning Allen continued as follows:

The Defendant: You have the right to restrain me, but you haven't got the right to remove me and you're not going to remove me.

The Court: I'll determine that.

The Defendant: No, you're not. There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial (A. 26).

After what the Court of Appeals describes as more "abusive remarks", the following removal occurred:

The Court: Mr. Bailiff, you will remove the defendant.

The Defendant: I want to be present in the courtroom when my trial is going on.

The Court: You may be present—

The Defendant: I'm going to be present.

The Court: (Continuing)—if you conduct yourself properly.

> We will proceed, in the absence of the defendant, who, by reason of his conduct is interfering with the proper trial of the case, wilfully and deliberately.
>
> (Thereupon, the defendant was taken out of the courtroom) (A. 26-27).

Subsequently, after the completion of jury selection, and before the presentation of the state's case, the trial judge extended—through defense counsel—an invitation for the respondent to return:

> And I wish you'd also advise him, at two o'clock, when the matter is resumed, that he may return to the courtroom, if he will agree to remain silent and obey the order of the court and respect the decorum of the court (A. 29).

After a court recess, and before the resumption of formal proceedings before the jury, Allen was brought before the court (A. 30). The trial judge then proceeded to inform the respondent that he, Allen, would be permitted to remain in the courtroom if he would agree to conduct himself properly (A. 30-31), to which Allen replied: "You ain't scaring me, Judge" (A. 31).

The trial judge then persisted in his attempt to have the respondent agree to accept his offer to return (A. 31). Allen's reply was: "I have the right to conduct myself any way I see fit, when I'm getting an unfair trial—and this is an unfair trial" (A. 31).

Despite the failure of the judge to acquire an affirmative indication of proper conduct by the respondent, the judge was willing and did give Allen an opportunity to remain (A. 32).

Thereafter the jury was brought in and the state was directed to proceed (A. 32). Allen immediately pro-

voked another confrontation with the judge and his second removal obtained:

> The Defendant: No. There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.
>
> The Court: Remove the defendant.
>
> The Defendant: I want to be in court.
>
> The Court: (Continuing)—and we will proceed through the trial without his presence.
>
> The Defendant: No, you're not going to proceed through the trial without my presence.
>
> (Thereupon, the defendant was taken from the courtroom) (A. 33).

Opening statements were made and the state presented its first witness (A. 33-37). The respondent was then called into the courtroom for purposes of identification. While there Allen requested that he remain in the courtroom. The following transpired:

> The Defendant: I want to stay in the courtroom.
>
> The Court: You may stay whenever you promise me to conduct youself properly.
>
> The Defendant: I'll promise you shit.
>
> (Thereupon, the defendant was taken out of the courtroom) (A. 38).

The next day, after conclusion of the state's case, and before the commencement of the defense, the trial judge again offered the respondent the opportunity to remain in the courtroom (A. 43). After the judge gained some assurance from Allen that he would not disturb the proceedings of the court, the respondent was permitted to stay through the remainder of the trial. Relative calm

was to prevail when evidence thought favorable to Allen's defense was introduced.

Senior Circuit Judge Hastings in his dissent reasoned that "[Allen] was given [his Sixth Amendment] right in this case, but made his own free choice to *voluntarily* reject his enjoyment of it."[37] Judge Hastings read the respondent's "gross misconduct" to indicate that Allen ". . . was brazenly determined to make a shambles of the criminal judicial process, unless he was permitted to dictate the rules of the game."[38]

The Supreme Court of Illinois concluded ". . . that the record reflects defendant's *awareness* of his right to conduct his own defense and his *deliberate* attempt to use this right to obstruct the trial. By such conduct, he *waived* any constitutional right to be present, confront the witnesses against him and conduct his own case at the times he was excluded from the courtroom."[39]

With respondent Allen's disgraceful conduct being a matter of pure and deliberate volition, to charge the trial court with exercising anything less than proper judicial discretion in interpreting the "waiver by misconduct" readily apparent herein, is to read into that concept a standard manifestly unfair to the proper administration of our criminal justice system.

Perhaps the issue was framed most appropriately by this Court in *Diaz*:

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37. 413 F.2d at 235 (Emphasis added.)

38. 413 F.2d at 235.

39. 226 N.E. 2d at 3-4 (Emphasis added.)

"The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of law, paralyze the proceedings of courts and juries and turn them into a solemn farce. . . ."[40]

CONCLUSION

The State of Illinois respectfully requests that the judgment of the Court of Appeals for the Seventh Circuit be reversed.

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40. 223 U.S. at 458, quoting with approval from *Falk* v. *United States*, 15 App. D.C. 446, 460 (1899).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 606

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM ALLEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Constitutional Provisions and Statutes Involved

In addition to the Sixth Amendment to the Constitution, the following constitutional articles and statutes are involved:

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"No person shall be . . . deprived of life, liberty or property, without due process of law."

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"No State shall . . . deprive any person of life, liberty or property, without due process of law."

ILLINOIS CONSTITUTION 1870, ARTICLE 2, SECTION 9:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the country or district in which the offense is alleged to have been committed."

ILLINOIS REVISED STATUTES, CHAPTER 38, SECTION 115-4(h):

> "A trial by the court and jury shall be conducted in the presence of the defendant unless he waives the right to be present."

Question Presented for Review

Is a defendant in a criminal proceeding denied his constitutional rights when he is excluded from the courtroom during the *voir dire* examination of jurors and the presentation of the prosecution's case?

ARGUMENT

I.

The Sixth Amendment Gives the Respondent the Right to Be Confronted With the Witnesses Against Him.

A. The Right of Confrontation Is Mandatory. It Cannot Be Involuntarily Waived.

The Sixth Amendment provides that the defendant in a criminal proceeding shall be confronted with the witnesses against him.[1] It is a fundamental right essential to a fair trial.[2] It is one of the fundamental guarantees of life and liberty.[3] Except for a voluntary absence from court once the trial begins, this right cannot be waived.[4]

In discussing the right of confrontation and why it cannot be waived, Mr. Justice Harlan, speaking for the Court in *Hopt* v. *Utah*,[5] said:

> "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a

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[1] *Hopt* v. *Utah*, 110 U.S. 574 (1884); *Shields* v. *United States*, 273 U.S. 583 (1927).

[2] *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965).

[3] *Kirby* v. *United States*, 174 U.S. 47, 55, 56 (1899).

[4] *Lewis* v. *United States*, 146 U.S. 370, 372 (1892).

[5] 110 U.S. 574, 579 (1884).

mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the production of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

Petitioner cites no case which distinguishes or limits *Hopt* or *Lewis*. Petitioner relies upon dictum in *Diaz* v. *United States*.[6] The *Diaz* case is distinguishable on its facts. In

[6] 223 U.S. 442 (1912).

Diaz, the trial was conducted in accordance with the rules of procedure of the Spanish law; the defendant had no right to a speedy trial or a jury trial. The case was conducted as if it was civil litigation. The Sixth Amendment to the United States Constitution was not applicable but rather a section of the Philippine Civil Government Act (which did not include the right of confrontation). Mr. Diaz expressly consented to some of the evidence introduced in his absence and some of the evidence was introduced by his own attorney. In the case before the Court, Allen objected to being removed and demanded the right to confront the witnesses against him (A. 26, 33).

Petitioner in a footnote states that "the force of *Hopt* and *Lewis* was further diminished by Mr. Justice Cardozo ... in Snyder v. Massachusetts."[7] Petitioner supports his statement by quoting out of context from a sentence and a footnote. Petitioner knows that Respondent's case is based on *Hopt* and *Lewis*. If these cases were diminished or limited by *Snyder* or any other case Petitioner would have elaborated in greater detail.

B. Historical Origin Requiring the Defendant's Presence and the Right of Confrontation.

Petitioner has implied that the right of confrontation evolved from the requirement that a defendant's presence was necessary at a criminal proceeding. This is not true. In earliest times the presence of the defendant was necessary because the trial was by "ordeal" or "battle."[8] In both

[7] 291 U.S. 97 (1934).

[8] G. Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 Colum. L. Rev. 18-21 (1916).

instances a verdict could not be reached without the defendant's actual presence. As the jury system developed the presence of the defendant was essential for him to present the dispute, accept the jurisdiction of the tribunal and wage battle or defend (he was not permitted counsel).[9] (There was no procedure by which to try an accused who did not appear; an accused who did not appear was made an "outlaw.")[10]

The right to confront witnesses did not appear in the common law until the 17th Century.[11] Its exact origin is not known but its inclusion in the Sixth Amendment was either because of the evils of the Star Chamber[12] or as a result of the abuses in the trial of Sir Walter Raleigh.[13]

C. The Purpose of the Right of Confrontation.

The right of confrontation serves a two-fold purpose. It gives the defendant an opportunity to face and cross-examine the witness and enables the judge and jury to

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[9] G. Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases,* 16 Colum. L. Rev. 18-21 (1916).

[10] G. Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases,* 16 Colum. L. Rev. 18, 20 (1916).

[11] F. Heller, *The Sixth Amendment to the Constitution of the United States, A Study in Constitutional Development* (1951).

[12] Sir Harry L. Stephen, *The Trial of Sir Walter Raleigh,* Transactions of the Royal Historical Society, Fourth Series, II 172 (1919).

[13] H. Hadley, *The Reform of Criminal Procedure,* Vol. X, No. 3, Acad. Pol. Sci. Proc. 94 (1923); Sir Walter Raleigh was convicted of treason in 1603. He was tried by examination without witnesses. The only evidence against him was the (unsworn) letters of Lord Cobham who had earlier confessed to treason. The trial is reported at II *Howell's State Trials* 1.

observe the witness' conduct and demeanor on the witness stand.[14]

Respondent concedes there are exceptions to the right of confrontation (dying declarations, documentary evidence, and when a witness is absent by the defendant's wrongful procurement). But this Court has steadfastly refused to make additional exceptions. In *Kirby* v. *United States*, 174 U.S. 47 (1899), this Court declared unconstitutional a statute which provided that in prosecutions for receiving stolen property the fact of the theft might be established by the record of the conviction of the thief. And in *Barber* v. *Page*, 390 U.S. 719 (1968), this Court held that if the absence of the witness cannot be attributed to any suggestion, procurement or act of the defendant, the Sixth Amendment will stand as a bar to reading any testimony given by an absent witness prior to the trial even though the defendant had been present at the time such testimony had been given.

Petitioner contends that the right to confront witnesses exists only in capital cases. Although the right of confrontation has been relaxed somewhat in misdemeanor cases,[15] there is nothing in the Constitution or the case law which abridges this right in any type of felony case. If Petitioner's proposition is correct then the abolition of the death penalty or the trial of a defendant for a non-capital felony would permit a *de facto* constitutional amendment nullifying the right of confrontation.

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[14] *State ex rel. Gladden* v. *Lonezgan*, 201 Ore. 163, 269 P.2d 491, 496 (1954); H. Hadley, *The Reform of Criminal Procedure*, Vol. X, No. 3, Acad. Pol. Sci. Proc. 94 (1923).

[15] *People* v. *Alexander*, 293 N.Y.S. 2d 138 (1968), Federal Rules of Criminal Procedure, 18 U.S.C. Rule 26.

D. How Trial Courts Have Dealt With the Unruly Defendant.

Petitioner cites three trial court cases (and several commentators) as authority for the proposition that a defendant's right to be present is waived when his behavior is unruly. Two of the cases were English cases[16] (in one the person was on trial for a misdemeanor).[17] The American case[18] did not discuss a defendant's Sixth Amendment rights. The fact that no other decisions can be found suggests that in other instances the unruly defendant was not removed but was kept in court by force. In *People* v. *Loomis*, 27 Cal. App. 2d 236, 80 P.2d 1012 (1938), when the defendant persisted in using profane expressions, fought with officers in the court, kicked the counsel table and threw himself on the floor, he was strapped to a wheel chair with a towel placed over his mouth. And in *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir. 1963), when one of the defendants climbed into the jury box and pushed the jurors in the front row, screaming vilifications, and another defendant during the course of his testimony threw a chair at the prosecuting attorney, they were gagged and shackled.

Petitioner suggests that the use of gags and shackles may turn the jury's sympathies in the defendant's favor. This conclusion is conjecture. One commentator believes that these restraints will expedite a conviction.[19]

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[16] *Regina* v. *Berry*, 104 L.T.J. 110 (Northhampton Assizes, 1897); *Rex* v. *Browne*, 70 J.P. 472 (London Cent. Crim. Ct. 1906).

[17] *Rex* v. *Browne*, 70 J.P. 472 (London Cent. Crim. Ct. 1906).

[18] *United States* v. *Davis*, 25 Fed. Cas. 773 (No. 14,923) (C.C.C., S.D.N.Y. 1869).

[19] P. Murray, *The Power to Expel a Criminal From His Own Trial, A Comparative View*, 36 U. Colo. L.R. 171, 173 (1964).

Besides physical restraint and the contempt power, there are two other methods by which a Court can deal with an unruly defendant. First, the defendant could be removed to another room and the trial televised to him. Secondly, the defendant could be seated in a soundproof booth in the courtroom from where he can see and hear the proceedings.[20] In each instance the defendant could "confront" the witnesses and communicate with his attorney by telephone.

E. The Danger Inherent in Permitting the Exclusion of an Unruly Defendant.

To permit an unruly defendant to be excluded from the trial is to condition the right of confrontation upon good behavior. If this becomes the law by what standards would a judge determine when a defendant misbehaves to the point where he can be excluded?

Was Allen abusive or unruly? Respondent does not believe so. If Allen was unruly it was only on three occasions, (1) when he was denied the right to represent himself (A. 25-27), (2) when the trial was to commence without him being able to notify his family and friends (A. 32-33), and (3) when he was brought into Court in shackles and a prison uniform the first time to be identified by a witness (A. 38). The other times Allen was in court—during the prosecution's case to be identified and for his defense—he conducted himself properly. Even if Allen was unruly, his actions were mild in comparison to some of the defendants before Judge Harold R. Medina in the trial of the Communist leaders[21] or some of the defendants now on trial

[20] This procedure was used in the sanity hearing for James B. Merkouris in Los Angeles in 1956.

[21] See *United States* v. *Sacher*, 9 F.R.D. 394 (1950).

before Judge Julius J. Hoffman in the "Chicago conspiracy trial".[22]

If the threat of exclusion does not accomplish the desired result of controlling and quieting a defendant, may a trial court escalate by denying some other rights, e.g. jury trial, right to counsel?

II.

The Case Is Moot.

Allen, after being in jail since 1957, was paroled on April 21, 1969. He will be discharged from his parole on April 21, 1971. If the decision of the Court of Appeals is reversed Allen will remain on parole. If the decision is affirmed Allen will be released (in view of *North Carolina* v. *Pearce*,[23] it is doubtful that he will be retried). The case is therefore moot because any decision will not affect either of the parties.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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January 27, 1970

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[22] *United States* v. *Dellinger*, 69 CR-180 (U.S.D.C., N.D. Ill, 1969).

[23] 395 U.S. 711 (1969).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 606

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM ALLEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY BRIEF FOR THE PETITIONER

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Printed by Authority of the State of Illinois

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STATE OF ILLINOIS,

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VS.

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

PREFACE

Respondent's Brief on the merits does not directly address the issue involved in this case—whether unruly courtroom behavior by a defendant effects a waiver of the right of confrontation—so much as it attempts to pick around the edges of Petitioner's Brief with criticisms which are, to say the least, disingenuous. We feel no compulsion, therefore, to reiterate the substance of our original argument, and this Reply is consequently limited to a brief refutation of the Respondent's Brief.

I.

(1) Respondent: "Except for a voluntary absence from court once the trial begins, this right [of confrontation] cannot be waived" (Resp. Br. 3).[1]

Reply: Respondent relies upon *Lewis* v. *United States*, 146 U.S. 370, 372 (1892) to support this flat assertion. But the issue in *Lewis*, a federal capital case, was whether the defendant was deprived of the right of confrontation, or, more properly, the right to be present at all stages of trial, when the record reflected that the jury had been selected out of his presence, a procedure to which he made proper and timely objection. This Court held that his right to be present could not be denied in this way. The *holding* of *Lewis*, therefore, does not govern this case or support Respondent's statement.

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1. Citing Lewis v. United States, 146 U.S. 370, 372 (1892).

Perhaps Respondent's reliance is based upon a *dictum* of Mr. Justice Shiras that "A leading principle . . . is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has at times, and in the cases of misdemeanors, been somewhat relaxed, yet in *felonies* it is not *in the power* of the prisoner, either by himself or his counsel, *to waive the right to be personally present during the trial.*"[2]

This statement of the law has since been repudiated, not only by almost every state in the Union, but by this Court as well. Only 20 years later, this Court, after examining the state and lower federal court precedents, *held* that the right of presence or confrontation could be waived in felony cases. *Diaz* v. *United States,* 223 U.S. 442, 455 (1912). And, in *Snyder* v. *Massachusetts,* 291 U.S. 97 (1934), this Court directly and explicitly repudiated the *dictum* of *Lewis.*[3]

(2) Respondent: "In *Diaz,* the trial was conducted in accordance with the rules of procedure of the Spanish Law; the defendant had no right to a speedy trial or a jury trial. The case was conducted as if it was civil litigation. The Sixth Amendment to the United States Constitution was not applicable but rather a section of the Philippine Civil Government Act (which did not include the right of confrontation)"[4] (Resp. Br. 5).

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2. *Lewis* v. *United States,* 146 U.S. at 372 (Emphasis added.)

3. See Petitioner's Brief at 12, ft. 15.

4. Respondent has, since the filing of his Brief, acknowledged, by letter of February 2, 1970 to the Clerk of this Court, that this parenthetical statement is in error.

Reply: This language, most of which is taken from the dissenting opinion, is simply not in point. On the issue of whether the right of confrontation was violated by the voluntary absence of Diaz from the trial, both the majority and the dissent *agreed* that the question was governed by §5 of the Philippine Civil Government Act—a congressional enactment and not a rule of "Spanish" criminal procedure—and both the majority and the dissent *agreed* that §5 was to be interpreted as the Court would interpret the Confrontation Clause of the Sixth Amendment.[5]

(3) Respondent: "Petitioner supports his statement that *Snyder* v. *Massachusetts* repudiated *Hopt* and *Lewis* by quoting out of context from a sentence and a footnote. Petitioner knows that Respondent's case is based on *Hopt*

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5. "An identical or similar provision [to §5] is found in the constitutions of the several States, and *its substantial equivalent is embodied in the Sixth Amendment* to the Constitution of the United States. It is the right which these constitutional provisions secure to persons accused of crime in this country *that was carried to the Philippines by the congressional enactment*, and, therefore, according to a familiar rule, the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there." 223 U.S. at 454-55 (majority opinion) (emphasis added.)

"Barring the right to indictment and trial by jury the defendant charged with a felony before a Philippine court has substantially the same rights as though he were on trial in a United States court. And if this conviction can stand, *it must be because the same things would be proper in this country, where the language of the Constitution is, in this respect, substantially the same as that of Philippine Bill of Rights* [citing §5]." (dissenting opinion at 223 U.S. 460) (emphasis added.)

and *Lewis*. If these cases were diminished or limited by *Snyder* or any other case Petitioner would have elaborated in greater detail" (Resp. Br. 5).

Reply: First, the charge that we are able to rely upon *Snyder* as favorable precedent only by quoting from that case "out of context" is untrue. In our original Brief, we said that the *Snyder* case rejected *Hopt* and *Lewis* as being not only *dictum*, but based solely upon the early common law. For this proposition we quoted the words of Mr. Justice Cardozo from the footnote in the *Snyder* opinion at 291 U.S. 117 (Pet. Br. 12, ft. 15). Since the only issue in *Snyder* was whether a jury view in the absence of a defendant violated the Due Process Clause,[6] and since the petitioner Snyder expressly relied upon *Hopt* and *Lewis*,[7] the action of this Court in denigrating the force of those two opinions, directly and expressly, could not be more plain. It is, to put it mildly, impertinent of Respondent to suggest that our reliance is based solely upon the device of quotation out of context.

Second, Respondent but exposes the weakness of his position when he complains that "Petitioner knows that Respondent's case is based on *Hopt* and *Lewis*." It is certainly not the fault of Petitioner if Respondent chooses to cling to these decisions long after they have been directly repudiated by this Court and almost every other court in the land. If the force of their *dictum* was so weak that Mr. Justice Cardozo could dispose of them in a summary

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6. The *Snyder* Court assumed, for purposes of decision, that due process included the protections of the Confrontation Clause of the Sixth Amendment. 291 U.S. at 106.

7. See 291 U.S. at 99.

footnote, we do not understand how we can be forced to "elaborate in greater detail" on why they are no longer vital precedents—if they ever were.

(4) Respondent: "Petitioner contends that the right to confront witnesses exists only in capital cases. Although the right of confrontation has been relaxed somewhat in misdemeanor cases, there is nothing in the Constitution or the case law which abridges this right in any type of felony case" (Resp. Br. 7).

Reply: This convoluted, straw man argument is totally out of place. Petitioner has never contended that the right of confrontation "exists only in capital cases" or that there was anything in the Constitution or the case law which "abridged" this right in felony cases. What we did say in our original Brief was that the early common law rule held the defendant's presence to be a jurisdictional prerequisite in all cases, but if any vestige of that *jurisdictional rule* still survives it does so only in capital cases, and that in all other cases, both felony and misdemeanor, the defendant may waive his right to be present (Pet. Br. 8-10, 13). This argument has nothing to do with whether the right of confrontation exists in any particular case. It exists in all cases. Our argument that the right was waived under the circumstances here is necessarily founded upon the recognition that the right existed in this felony case.

(5) Respondent: The argument is made that our authority consists only of trial court opinions and the "fact that no other decisions can be found suggests that in other instances the unruly defendant was not removed but was kept in court by force" (Resp. Br. 8). It is also suggested that our observation that the use of shackles and gags may improperly elicit jury sympathy for a defendant

is "conjecture" and that, indeed, the opposite might well be true (Resp. Br. 8).

Reply: We have cited every case *on point* that exhaustive research in Anglo-American jurisprudence was able to disclose. Of more importance than the rank of the courts upon which we rely is the fact that Respondent has cited *no* case which has ever held that the expulsion of an unruly defendant violates the Sixth Amendment or any other rule.

Moreover, we have no quarrel with those cases which have upheld the use of shackles or gags. Our point is that a trial judge should not be forced into a constitutional straitjacket which compels him to use *only* that remedy to deal with a defendant determined to exploit his right of confrontation as the weapon by which the orderly processes of justice are destroyed. Whether the inappropriate use of shackles and gags may prejudice the defendant or the state is not important. What is important is that this remedy may, in a particular case, have prejudicial side effects which could be avoided if the Sixth Amendment does not foreclose the exercise of judicial discretion in seeking and employing other appropriate remedies.

(6) Respondent: "First, the defendant could be removed to another room and the trial televised to him. Secondly, the defendant could be seated in a soundproof booth in the courtroom from where he can see and hear the proceedings. In each instance the defendant could 'confront' the witnesses and communicate with his attorney by telephone" (Resp. Br. 9).

Reply: ". . . to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them."[8]

(7) Respondent: "To permit an unruly defendant to be excluded from the trial is to condition the right of confrontation upon good behavior" (Resp. Br. 9).

Reply: Precisely. There is nothing strange about the notion that enjoyment of constitutional rights may be conditioned upon one circumstance or another. The right of free speech is conditioned upon the assumption that it will not be employed in a libelous or obscene manner. The privilege against self-incrimination is conditioned upon the assumption that the witness will not seek only to give evidence on direct examination and avoid cross-examination by the State. Moreover, there is hardly a constitutional right in existence which the accused does not have the power to waive, by word or deed. That is all that is in issue here.

(8) Respondent: "Was Allen abusive or unruly? Respondent does not believe so. If Allen was unruly it was only on three occasions[9] . . . . The other times Allen was in court—during the prosecution's case to be identified and for his defense—he conducted himself properly" (Resp. Br. 9).

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8. *Snyder* v. *Massachusetts*, 291 U.S. at 122.

9. Respondent claims that one of the "occasions" was "when he was brought into Court in shackles and a prison uniform . . . (A. 38)" (Resp. Br. 9). Respondent was a prisoner in the County Jail during the time he was not in court. County Jail prisoners do not wear prison uniforms at trial. Nothing on page 38 of the Abstract, or any other part of the record, supports Respondent's claim that he was required to appear before the jury in a "prison uniform."

Reply: Respondent misconceives the thrust of our argument if he believes that it is important how many times he was unruly. In our original Brief, we detailed all of the conduct which led to his exclusion (Pet. Br. 23-28). What is crucial is that the record demonstrates beyond a shadow of a doubt that Respondent's conduct, whatever its incidence or duration, was designed to interfere with the orderly presentation of the State's case and that he knowingly continued it only to the point where further exclusion would interfere with the presentation of *his* evidence.

(9) Respondent: "If the threat of exclusion does not accomplish the desired result of controlling and quieting a defendant, may a trial court escalate by denying some other rights, e.g., jury trial, right to counsel?" (Resp. Br. 10).

Reply: No.

II.

THIS CASE IS NOT MOOT.

The Respondent misconceives the legal significance of parole and its ramifications and furthermore cites no authority for his incorrect assumption that the instant cause is moot.

This Court has concluded that a state prisoner who has been placed on parole is "in custody" for the purposes of a federal court determination of whether his state sentence was imposed in violation of the United States Constitution. *Jones* v. *Cunningham,* 371 U.S. 236 (1963).[10]

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10. Parole in *Jones* was granted while petitioner's appeal was pending in the Court of Appeals. 371 U.S. at 236 (ft. 1).

In *Jones* the fact that the petitioner's parole released him from immediate physical imprisonment did not remove him from the "custody" of the parole board because of the Court's conclusion that parole imposes conditions which significantly confine and restrain freedom.[11]

In *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) this Court held that once federal *habeas corpus* jurisdiction attached with respect to prisoners in state custody, such jurisdiction was not at an end prior to the completion of such proceedings notwithstanding even the final expiration of the petitioner's sentence.[12] Recognizing the collateral consequences which flow from felony convictions, this Court dismissed the claim of mootness.[13]

Clearly the respondent has both mistakenly interpreted the concept of mootness and the entire body of law which surrounds that legal proposition.

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11. 371 U.S. at 243.

12. The petitioner in *Carafas* applied to the United States District Court for a writ of *habeas corpus* in June, 1963. He was in custody at that time. On March 6, 1967 the petitioner's sentence expired, and he was discharged from the parole status on which he had been since October 4, 1964. A writ of certiorari issued on October 16, 1967. 391 U.S. at 236.

13. 391 U.S. at 237-238. See also Sibron v. New York, 392 U.S. 40, 53-58 (1968). In Illinois, Allen's conviction for an infamous felony carries with it similar disabilities, such as incapacity to vote and to serve as a juror. Ch. 38, §124-2 Ill. Rev. Stat. (1967).

CONCLUSION

For the reasons stated in our original Brief, and in this Reply Brief, Petitioner requests that the judgment of the Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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No. 606

Petition for rehearing
filed on Apr. 24, 1970.
(not printed)

SUPREME COURT OF THE UNITED STATES

No. 606.—October Term, 1969

State of Illinois, Petitioner, v. William Allen. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 31, 1970]

Mr. Justice Black delivered the opinion of the Court.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." We have held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. *Pointer* v. *Texas*, 380 U. S. 400 (1965). One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. *Lewis* v. *United States*, 146 U. S. 370 (1892). The question presented in this case is whether an accused can claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial.

The issue arose in the following way. The respondent, Allen, was convicted by an Illinois jury of armed robbery and was sentenced to serve 10 to 30 years in the Illinois State Penitentiary. The evidence against him showed that on August 12, 1956, he entered a tavern in Illinois and, after ordering a drink, took $200 from the bartender

at gunpoint. The Supreme Court of Illinois affirmed his conviction, *People* v. *Allen*, 37 Ill. 2d 167, 226 N. E. 2d 1 (1967), and this Court denied certiorari. 389 U. S. 907 (1967). Later Allen filed a petition for a writ of habeas corpus in federal court alleging that he had been wrongfully deprived by the Illinois trial judge of his constitutional right to remain present throughout his trial. Finding no constitutional violation, the District Court declined to issue the writ. The Court of Appeals reversed, 413 F. 2d 232 (1969), Judge Hastings dissenting. The facts surrounding Allen's expulsion from the courtroom are set out in the Court of Appeals' opinion sustaining Allen's contention:

> "After his indictment and during the pretrial stage, the petitioner [Allen] refused court-appointed counsel and indicated to the trial court on several occasions that he wished to conduct his own defense. After considerable argument by the petitioner, the trial judge told him, 'I'll let you be your own lawyer, but I'll ask Mr. Kelly [court-appointed counsel] [to] sit in and protect the record for you, insofar as possible.'
>
> "The trial began on September 9, 1956. After the State's Attorney had accepted the first four jurors following their *voir dire* examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to

act as his lawyer. He terminated his remarks by saying, 'When I go out for lunchtime, you're [the judge] going to be a corpse here.' At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. He continued to talk back to the judge, saying, 'There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.' After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The *voir dire* examination then continued and the jury was selected in the absence of the petitioner.

"After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved [himself] and [did] not interfere with the introduction of the case.' The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The defendant protested this effort on the part of his attorney, saying: 'There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want

my sister and my friends here in court to testify for me.' The trial judge thereupon ordered the petitioner removed from the courtroom." 413 F. 2d, at 233–234.

After this second removal, Allen remained out of the courtroom during the presentation of the State's case-in-chief, except that he was brought in on several occasions for purposes of identification. During one of these latter appearances, Allen responded to one of the judge's questions with vile and abusive language. After the prosecution's case had been presented, the trial judge reiterated his promise to Allen that he could return to the courtroom whenever he agreed to conduct himself properly. Allen gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel.

The Court of Appeals went on to hold that the Supreme Court of Illinois was wrong in ruling that Allen had by his conduct relinquished his constitutional right to be present, declaring that:

> "No conditions may be imposed on the absolute right of a criminal defendant to be present at all stages of the proceedings. The insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver. Such conditions, if insisted upon, should and must be dealt with in a manner that does not compel the relinquishment of his right.
>
> "In light of the decision in *Hoyt* v. *Utah*, 110 U. S. 574 (1884) and *Shields* v. *United States*, 273 U. S. 583 (1927) as well as the constitutional mandate of the Sixth Amendment, we are of the view that the defendant should not have been excluded from the courtroom during his trial despite his disruptive and disrespectful conduct. The proper

course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged." 413 F. 2d, at 235.

The Court of Appeals felt that the defendant's Sixth Amendment right to be present at his own trial was so "absolute" that, no matter how unruly or disruptive the defendant's conduct might be, he could never be held to have lost that right so long as he continued to insist upon it, as Allen clearly did. Therefore the Court of Appeals concluded that a trial judge could never expel a defendant from his own trial and that the judge's ultimate remedy when faced with an obstreperous defendant like Allen who determines to make his trial impossible is to bind and gag him.[1] We cannot agree that the Sixth Amendment, the cases upon which the Court of Appeals relied, or any other cases of this Court so handicap a trial judge in conducting a criminal trial. The broad dicta in *Hoyt* v. *Utah, supra,* and *Lewis* v. *United States,* 146 U. S. 370 (1892), that a trial can never continue in the defendant's absence has been expressly rejected. *Diaz* v. *United States,* 223 U. S. 442 (1912). We accept instead the statement of Mr. Justice Cardozo who, speaking for the Court in *Snyder* v. *Massachusetts,* 291 U. S. 97, 106 (1938), said: "No doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct."[2] Although mindful that courts must indulge every reasonable pre-

[1] In a footnote the Court of Appeals also referred to the trial judge's contempt power. This subject is discussed in Part II of this opinion. *Infra,* at 7–8.

[2] Rule 43 of the Federal Rules of Criminal Procedure provides that "[i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

sumption against the loss of constitutional rights, *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.[2] Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

I

Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent

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[2] See Murray, The Power to Expel a Criminal Defendant From His Own Trial: A Comparative View, 36 U. Colo. L. Rev. 171, 171–175 (1964); Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases, 16 Col. L. Rev. 18, 18–31 (1916).

comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint. It is in part because of these inherent disadvantages and limitations in this method of dealing with disorderly defendants that we decline to hold with the Court of Appeals that a defendant cannot under any possible circumstances be deprived of his right to be present at trial. However, in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here.

II

In a footnote the Court of Appeals suggested the possible availability of contempt of court as a remedy to make Allen behave in his robbery trial, and it is true that citing or threatening to cite a contumacious defendant for criminal contempt might in itself be sufficient to make a defendant stop interrupting a trial. If so, the problem would be solved easily, and the defendant could remain in the courtroom. Of course, if the defendant is determined to prevent *any* trial, then a court in attempting to try the defendant for contempt is still confronted with the identical dilemma that the

Illinois court faced in this case. And criminal contempt has obvious limitations as a sanction when the defendant is charged with a crime so serious that a very severe sentence such as death or life imprisonment is likely to be imposed. In such a case the defendant might not be affected by a mere contempt sentence when he ultimately faces a far more serious sanction. Nevertheless, the contempt remedy should be borne in mind by a judge in the circumstances of this case.

Another aspect of the contempt remedy is the judge's power, when exercised consistently with state and federal law, to imprison an unruly defendant such as Allen for civil contempt and discontinue the trial until such time as the defendant promises to behave himself. This procedure is consistent with the defendant's right to be present at trial, and yet it avoids the serious shortcomings of the use of shackles and gags. It must be recognized, however, that a defendant might conceivably, as a matter of calculated strategy, elect to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time. A court must guard against allowing a defendant to profit from his own wrong in this way.

III

The trial court in this case decided under the circumstances to remove the defendant from the courtroom and to continue his trial in his absence until and unless he promised to conduct himself in a manner befitting an American courtroom. As we said earlier, we find nothing unconstitutional about this procedure. Allen's behavior was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint. Prior to his removal he was repeatedly warned by the trial judge

that he would be removed from the courtroom if he persisted in his unruly conduct, and, as Judge Hastings observed in his dissenting opinion, the record demonstrates that Allen would not have been at all dissuaded by the trial judge's use of his criminal contempt powers. Allen was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner. Under these circumstances we hold that Allen lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial.

IV

It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case. The record shows that the Illinois judge at all times conducted himself with that dignity, decorum, and patience that

befits a judge. Even in holding that the trial judge had erred, the Court of Appeals praised his "commendable patience under severe provocation."

We do not hold that removing this defendant from his own trial was the only way the Illinois judge could have constitutionally solved the problem he had. We do hold, however, that there is nothing whatever in this record to show that the judge did not act completely within his discretion. Deplorable as it is to remove a man from his own trial, even for a short time, we hold that the judge did not commit legal error in doing what he did.

The judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 606.—October Term, 1969

State of Illinois, Petitioner, v. William Allen. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 31, 1970]

Mr. Justice Brennan, concurring.

The safeguards that the Constitution accords to criminal defendants presuppose that government has a sovereign prerogative to put on trial those accused in good faith of violating valid laws. Constitutional power to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace. History has known the breakdown of lawful penal authority—the feud, the vendetta, and the terror of penalties meted out by mobs or roving bands of vigilantes. It has known, too, the perversion of that authority. In some societies the penal arm of the state has reached individual men through secret denunciation followed by summary punishment. In others the solemn power of condemnation has been confided to the caprice of tyrants. Down the corridors of history have echoed the cries of innocent men convicted by other irrational or arbitrary procedures. These are some of the alternatives history offers to the procedure adopted by our Constitution. The right of a defendant to trial—to trial by jury—has long been cherished by our people as a vital restraint on the penal authority of government. And it has never been doubted that under our constitutional traditions trial in accordance with the Constitution is the proper mode by which government exercises that authority.

Lincoln said this Nation was "conceived in liberty and dedicated to the proposition that all men are created equal." The Founders' dream of a society where all men are free and equal has not been easy to realize. The degree of liberty and equality that exists today has been the product of unceasing struggle and sacrifice. Much remains to be done—so much that the very institutions of our society have come under challenge. Hence, today, as in Lincoln's time, a man may ask "whether [this] nation or any nation so conceived and so dedicated can long endure." It cannot endure if the Nation falls short on the guarantees of liberty, justice, and equality embodied in our founding documents. But it also cannot endure if we allow our precious heritage of ordered liberty to be ripped apart amid the sound and fury of our time. It cannot endure if in individual cases the claims of social peace and order on the one side and of personal liberty on the other cannot be mutually resolved in the forum designated by the Constitution. If that resolution cannot be reached by judicial trial in a court of law, it will be reached elsewhere and by other means, and there will be grave danger that liberty, equality, and the order essential to both will be lost.

The constitutional right of an accused to be present at his trial must be considered in this context. Thus there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward. Almost a half century ago this Court in *Diaz* v. *United States*, 223 U. S. 442, 457–458 (1912), approved what I believe is the governing principle. We there quoted from *Falk* v. *United States*, 15 App. D. C. 446 (1899), the case of an accused who appeared at his trial but fled the jurisdiction before it was completed. The court proceeded in his absence, and a verdict of guilty was returned. In affirming the conviction over

the accused's objection that he could not be convicted in his absence, the Court of Appeals for the District of Columbia said:

> "It does not seem to us to be consonant with the dictates of common sense that an accused person . . . should be at liberty, whenever he pleases, . . . to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. . . . This would be a travesty of justice which could not be tolerated . . . . [W]e do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration of justice as to the true interests of civil liberty. . . .
>
> "The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong."

To allow the disruptive activities of a defendant like respondent to prevent his trial is to allow him to profit from his own wrong. The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes which the Constitution itself prescribes.

Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior. The record makes clear that respondent was so informed and warned in this case. Thus there can be no doubt that respondent, by persisting in his reprehensible conduct, surrendered his right to be present at the trial.

As the Court points out, several remedies are available to the judge faced with a defendant bent on disrupting his trial. He can have him bound, shackled, and gagged; he can hold him in civil or criminal contempt; he can exclude him from the trial and carry on in his absence. No doubt other methods can be devised. I join the Court's opinion and agree that the Constitution does not require or prohibit the adoption of any of these courses. The constitutional right to be present can be surrendered if it is abused for the purpose of frustrating the trial. Due process does not require the presence of the defendant if his presence means that there will be no orderly process at all. However, I also agree with the Court that these three methods are not equally acceptable. In particular, shackling and gagging a defendant is surely the least of them. It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law.

I would add only that when a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances.

SUPREME COURT OF THE UNITED STATES

No. 606.—October Term, 1969

State of Illinois, Petitioner, v. William Allen. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 31, 1970]

Mr. Justice Douglas.

I agree with the Court that a criminal trial, in the constitutional sense, cannot take place where the courtroom is a bedlam and either the accused or the judge is hurling epithets at the other. A courtroom is a hallowed place where trials must proceed with dignity and not become occasions for entertainment by the participants, by extraneous persons, by modern mass media or otherwise.

My difficulty is not with the basic hypothesis of this decision, but with the use of this case to establish the appropriate guidelines for judicial control.

This is a state case, the trial having taken place nearly 13 years ago. That elapse of time is not necessarily a barrier to a challenge of the constitutionality of a criminal conviction. But in this case it should be.

There is more than an intimation in the present record that the defendant was a mental case. The passage of time since 1957, the date of the trial, makes it, however, impossible to determine what the mental condition of the defendant was at that time. The fact that a defendant has been found to understand "the nature and object of the proceedings against him" and thus competent to stand trial[1] does not answer the difficult questions as to what a trial judge should do with an otherwise mentally ill defendant who creates a court-

[1] See n. 5, *infra*.

room disturbance. What a judge should do with a defendant whose courtroom antics may not be volitional is a perplexing problem which we should not reach except on a clear record. This defendant had no lawyer and refused one, though the trial judge properly insisted that a member of the bar be present to represent him. He tried to be his own lawyer and what transpired was pathetic, as well as disgusting and disgraceful.

We should not reach the merits but should reverse the case for staleness of the record and affirm the denial of relief by the District Court. After all, behind the issuance of a writ of habeas corpus is the exercise of an informed discretion. The question, how to proceed in a criminal case against a defendant who is a mental case, should be resolved only on a full and adequate record.

Our real problems of this type lie not with this case but with other kinds of trials. *First* are the political trials. They frequently recur in our history [2] and insofar

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[2] From *Spies* v. *People*, 122 Ill. 1, involving the Haymarket Riots, *In re Debs*, 158 U. S. 568, involving the Pullman strike, *Mooney* v. *Holohan*, 294 U. S. 103, involving the copper strikes of 1917; *Sacco & Vanzetti* v. *State*, 255 Mass. 369, 259 Mass. 128, 261 Mass. 12, involving the Red scare of the 20's; to *Dennis* v. *United States*, 341 U. S. 494, involving an agreement to teach Marxism.

As to the Haymarket riot resulting in the *Spies* case, see Commons, History of Labor in the United States, pp. 386 *et seq.* (1918); Swindler, Court & Constitution in the 20th Century, cc. 3 and 4 (1969).

As to the Pullman strike and the *Debs* case, see Pfeffer, This Honorable Court, pp. 215–216 (1966); Lindsey, The Pullman Strike, cc. XII and XIII (1942); Commons, History of Labor in the United States, pp. 502–508 (1918).

As to the *Mooney* case, see the January 18, 1922, issue of *The New Republic;* Frost, The Mooney Case (1968).

As to the *Sacco-Vanzetti* case see Fraenkel, The Sacco-Vanzetti Case; Frankfurter, The Case of Sacco-Vanzetti.

As to the repression of teaching involved in the *Dennis* case, see Kirchheimer, Political Justice, pp. 132–158 (1961).

as they take place in federal courts we have broad supervisory powers over them. That is one setting where the question arises whether the accused has rights of confrontation that the law invades at its peril.

In Anglo-American law, great injustices have at times been done to unpopular minorities by judges, as well as by prosecutors. I refer to London in 1670 when William Penn, the gentle Quaker, was tried for causing a riot when all that he did was to preach a sermon on Grace Church Street, his church having been closed under the Conventicle Act:

> "Penn. I affirm I have broken no law, nor am I Guilty of the indictment that is laid to my charge; and to the end the bench, the jury, and myself, with these that hear us, may have a more direct understanding of this procedure, I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.
>
> "Recorder. Upon the common-law.
>
> "Penn. Where is that common-law?
>
> "Recorder. You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.
>
> "Penn. This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.
>
> "Recorder. Sir, will you plead to your indictment?
>
> "Penn. Shall I plead to an Indictment that hath no foundation in law? If it contain that law you say I have broken, why should you decline to produce that law, since it will be impossible for the jury to determine, or agree to bring in their verdict, who have not the law produced, by which they

should measure the truth of this indictment, and the guilt, or contrary of my fact?

"Recorder. You are a saucy fellow, speak to the Indictment.

"Penn. I say, it is my place to speak to matter of law; I am arraigned a prisoner; my liberty, which is next to life itself, is now concerned: you are many mouths and ears against me, and if I must not be allowed to make the best of my case, it is hard, I say again, unless you show me, and the people, the law you ground your indictment upon, I shall take it for granted your proceedings are merely arbitrary

. . . . .

"Recorder. The question is, whether you are Guilty of this Indictment?

"Penn. The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common-law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.

"Recorder. You are an impertinent fellow, will you teach the court what law is? It is 'Lex non scripta,' that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?

"Penn. Certainly, if the common law be so hard to be understood, it is far from being very common; but if the lord Coke in his Institutes be of any consideration, he tells us, That Common-Law is common right, and that Common Right is the Great Charter-Privileges. . . .

"Recorder. Sir, you are a troublesome fellow, and it is not for the honour of the court to suffer you to go on.

"Penn. I have asked but one question, and you have not answered me; though the rights and privileges of every Englishman be concerned in it.

"Recorder. If I should suffer you to ask questions till to-morrow morning, you would be never the wiser.

"Penn. That is according as the answers are.

"Recorder. Sir, we must not stand to hear you talk all night.

"Penn. I design no affront to the court, but to be heard in my just plea: and I must plainly tell you, that if you will deny me Oyer of that law, which you suggest I have broken, you do at once deny me an acknowledged right, and evidence to the whole world your resolution to sacrifice the privileges of Englishmen to your sinister and arbitrary designs.

"Recorder. Take him away. My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do any thing to night.

"Mayor. Take him away, take him away, turn him into the bale-dock."[3] The Trial of William Penn, 6 How. St. Tr. 951, 958–959.

The panel of judges who tried William Penn were sincere, law-and-order men of their day. Though Penn was acquitted by the jury, he was jailed by the court for his contemptuous conduct. Would we tolerate re-

[3] At Old Bailey, where the William Penn trial was held the baledock (or baildock) was "a small room taken from one of the corners of the court, and left open at the top; in which, during the trials, are put some of the malefactors." Oxford Eng. Dict.

moval of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in that situation?

Problems of political indictments and of political judges raise profound questions going to the heart of the social compact. For that compact is two-sided: majorities undertake to press their grievances within limits of the Constitution and in accord with its procedures; minorities agree to abide by constitutional procedures in resisting those claims.

Does the answer to that problem involve defining the procedure for conducting political trials or does it involve the designing of constitutional methods for putting an end to them? This record is singularly inadequate to answer those questions. It will be time enough to resolve those weighty problems when a political trial reaches this Court for review.

Second are trials used by minorities to destroy the existing constitutional system and bring on repressive measures. Radicals on the left historically have used those tactics to incite the extreme right with the calculated design of fostering a regime of repression from which the radicals on the left hope to emerge as the ultimate victor.[4] The left in that role is the provocateur. The Constitution was not designed as an instrument for that form of rough-and-tumble contest. The social compact has room for tolerance, patience, and restraint, but not for sabotage and violence. Trials involving that spectacle strike at the very heart of constitutional government.

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[4] As respects the strategy of German Communists *vis-à-vis* the Nazis in the 1930's, see Heiden, Der Fuehrer, pp. 461, 462, 525, 551–552 (1944).

I would not try to provide in this case the guidelines for those two strikingly different types of cases. The case presented here is the classical criminal case without any political or subversive overtones. It involves a defendant who was a sick person and who may or may not have been insane in the classical sense [5] but who apparently had a diseased mind. And, as I have said, the record is so stale that it is now much too late to find out what the true facts really were.

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[5] In a 1956 pretrial sanity hearing, Allen was found to be incompetent to stand trial. Approximately a year later, however, on October 19, 1957, in a second competency hearing, he was declared sane and competent to stand trial.

Allen's sister and brother testified in Allen's behalf at the trial. They recited instances of Allen's unusual past behavior and stated that he was confined to a mental institution in 1953, although no reason for this latter confinement was given. A doctor called by the prosecution testified that he had examined Allen shortly after the commission of the crime which took place on August 12, 1956, and on other subsequent occasions, and that, in his opinion, Allen was sane at the time of each examination. This evidence was admitted on the question of Allen's sanity at the time of the offense. The jury found him sane at that time and the Illinois Supreme Court affirmed that finding. See *People* v. *Allen*, 37 Ill. 2d 167.

At the time of Allen's trial in 1957, the tests in Illinois for the defendant's sanity at the time of the criminal act were the M'Naghten Rules supplemented by the so-called "irresistible impulse test." *People* v. *Carpenter*, 11 Ill. 2d 60, 142 N. E. 2d 11. The tests for determining a defendant's sanity at the time of trial were that "[h]e should be capable of understanding the nature and object of the proceedings against him, his own condition in reference to such proceedings, and have sufficient mind to conduct his defense in a rational and reasonable manner," and, further, that "he should be capable of co-operating with his counsel to the end that any available defenses may be interposed." *People* v. *Burson*, 11 Ill. 2d 360, 369, — N. E. 2d —, —.